Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

No. 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL C. McCRARY, etc., *et al.*,

and

COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON

and

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALLISON W. BROWN, JR.
Suite 437 -
3000 Connecticut Avenue, N.W.
Washington, D.C. 20008

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204

Attorneys for Petitioners

RODERICK V.O. BOGGS
Washington Lawyers' Committee
for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

Of Counsel

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IN THE

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OCTOBER TERM, 1975

No.

MICHAEL C. McCRARY, etc., *et al.*,

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COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON

and

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit in this case.[1]

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[1] Review is sought of the judgments in four cases (Nos. 73-2349, 73-2350, 73-2351 and 73-2352) that were consolidated with a fifth case in a single proceeding in the court of appeals. Two petitions for certiorari to review other aspects of the court of appeals proceeding have been filed in this Court (75-62 and 75-66, October Term, 1975) and another petition for certiorari is expected by the intervenor-defendant in the district court, Southern Independent School Association. Petitioners herein, in addition to Michael C. McCrary and Colin M. Gonzales, infants who sued through their respective parents, include their parents, Curtis L. McCrary and Sandra McCrary, and Raymond Gonzales and Margaret R. Gonzales.

Has been filed. No. 75-278.

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion (App. B, *infra*, pp. 3a-36a) are reported at 515 F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973 (App. C, *infra*, pp. 36a-45a) is reported at 363 F. Supp. 1200. A memorandum opinion and order of the district court which issued April 16, 1973 (App. D, *infra*, pp. 46a-47a) is unreported.

JURISDICTION

The judgments of the court of appeals in the consolidated cases (App. E, *infra*, pp. 48a-52a) were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals issued on May 29, 1975 (App. B, *infra*, p. 33a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit for deprivation of civil rights under 42 U.S.C. Sec. 1981 is subject to Virginia's two-year statute of limitations applicable to an action based on physical or bodily injury, or whether such a suit is more properly subject to the five-year limitations period generally applicable to a "personal action" which survives the death of a party.

2. Whether a party who attempts to conceal his racially discriminatory conduct in a civil rights case in Federal District Court by giving false testimony under oath displays "obdurate obstinancy" justifying an award of attorneys' fees against him.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. Sec. 1981, and Section 8-24, Code of Virginia (1950). They are set forth in App. A, *infra*, pp. 1a-2a.

STATEMENT

In early May 1969, the parents of Colin Gonzales, a black child, contacted Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling Colin in the school's summer day camp program, and continuing in the first grade in the fall (*infra*, p. 6a). The Gonzales' had learned of the school through an advertisement in the Yellow Pages of the telephone directory, through a mass mailing from the school addressed to "Resident," and from a friend whose son attended the summer camp *(ibid.)*. Thereafter, the Gonzales' visited the school with Colin, and completed an application form for his admission. They also furnished, as required, a medical certificate and application fee *(ibid.)*. On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given (*infra*, pp. 6a-7a). Mr. Gonzales called the school and spoke to someone identified as Captain Stuart Reiss, Chairman of the Board. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated (*infra*, p. 7a).

Subsequent to his son's rejection by Fairfax-Brewster School, Mr. Gonzales telephoned Bobbe's Private School. This school, which is located in Arlington County, Virginia, advertises in the Yellow Pages, and also solicits students

by direct mail advertising *(ibid.)*. In response to his inquiry about enrolling his son, Mr. Gonzales was told that only members of the Caucasian race were accepted *(ibid.)*.

In August 1972, the mother of Michael McCrary, a black child, called Bobbe's School about enrolling him in the nursery school program. She asked whether school was integrated and accepted blacks, and was told it did not *(ibid.)*.

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees (*infra*, p. 45a). The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950) (*infra*, pp. 46a-47a).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to support the district court's factual findings that Colin Gonzales and Michael McCrary were excluded from the two schools

on grounds of race (*infra*, p. 9a). The court of appeals also agreed with the district court's conclusion that plaintiffs' rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claim was barred by Virginia's two-year statue of limitations (*infra*, pp. 34a-35a). Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant. The dissenting judges based their conclusion on the district court's finding that officials of the defendant schools did not testify truthfully concerning the racial basis for excluding the two children, and the dissenters felt that this was a "pernicious form of obstinancy" that justified the award of attorneys' fees to plaintiffs (*infra*, pp. 22a, 35a).

REASONS FOR GRANTING THE WRIT

I.

This is the latest example in what has become a significant body of authority where the Fourth Circuit, as well as the district courts in Virginia, have consistently misapplied that state's statute of limitations in cases brought under the older civil rights statutes – Sections 1981, 1982 and 1983 of Title 42, U.S.C.[2] In the instant case, as well

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[2] See *Almond v. Kent*, 459 F.2d 200, 203-204 (C.A. 4, 1972); *Allen v. Gifford*, 462 F.2d 615 (C.A. 4, 1972), cert. denied, *sub*

(continued)

all others in this line, the courts have misconstrued Section 8-24, Code of Virginia (1950) to apply the two-year limitations period, rather than the appropriate five-year limitations period contained in the section. The error of the approach taken in these cases is exemplified by the Fourth Circuit's opinion in this instance, where, by characterizing this suit, which seeks vindication of constitutional rights, as merely an action for "personal injury" seeking recovery for "injured feelings and humiliation" (*infra*, p. 35a), the court not only demeans the constitutional rights at stake, but it distorts the essential nature of the case in order to apply a statute of limitations to the action, which, on the basis of decisions in non-civil rights cases, is clearly not applicable.

42 U.S.C. Sec. 1981, upon which this case is based, was enacted by Congress under its power granted by the Thirteenth Amendment to eliminate the badges and incidents of slavery which had so long encumbered black persons in this country. *Jones v. Mayer Co.*, 392 U.S. 409, 438-441 (1968); *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439-440 (1973). By its broad and unqualified terms, that statute guarantees blacks the same right

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[2] (continued) *nom., Gifford v. Allen*, 409 U.S. 876; *Revere v. Tidewater Telephone Co.*, 6 FEP Cases 891, 892 (C.A. 4, 1973); *Sitwell v. Burnette*, 349 F. Supp. 83, 85-86 (W.D. Va., 1972); *Landman v. Brown*, 350 F. Supp. 303, 306 (E.D. Va., 1972); *Landman v. Royster*, 354 F. Supp. 1302, 1314 (E.D. Va., 1973); *Taliaferro v. State Council of Higher Education*, 372 F. Supp. 1378, 1383 (E. D. Va., 1974); *Cradle v. Superintendent, Correctional Field Unit # 7*, 374 F. Supp. 435, 437, n. 3 (W.D. Va., 1973); *Wilkinson v. Hamel*, 381 F. Supp. 768, 769 (W.D. Va., 1974); *Edgerton v. Puckett*, 391 F. Supp. 463 (W.D. Va., 1975); *Van Horn v. Lukhardt*, 392 F. Supp. 384, 391 (E.D. Va., 1975).

"to make and enforce contracts" as is enjoyed by whites. "An individual who establishes a cause of action under Section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." *Johnson v. Railway Express Agency, Inc.*, 95 S. Ct. 1716, 1720 (1975). A successful action under Section 1981 accomplishes the dual function of enforcing a public policy proclaimed by the Constitution and implemented by Congress, and, in addition, providing redress for the individual whose rights have been violated.

By holding that Mr. and Mrs. Gonzales' claims for damages were barred by Virginia's two-year statute of limitations for "personal injuries," the court of appeals followed the rationale that it stated earlier in *Almond v. Kent, supra*, 459 F.2d at 203-204, where it held that the same two-year limitations period was applicable to an action brought under 42 U.S.C. Sec. 1983.[3] In the *Almond* case the court acknowledged that where, as in these early civil rights statutes, Congress has not fixed a limitations period, the "federal courts follow the limitations period fixed by the law of the state in which the district court is held." 459 F.2d at 203. In that decision, however, the court of appeals proceeded to construe Section 8-24 of the Virginia Code in a manner which is inconsistent with the statutory

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[3] An amendement to Section 8-24 enacted by the Virginia General Assembly subsequent to the *Almond* decision, which purports to shorten the limitation period for Sec. 1983 actions from two years to one year (Va. Acts 1973, ch. 385), has been ruled unconstitutionally discriminatory by two district courts. Both courts continue to apply the two-year rule mandated by *Almond*. See *Edgerton v. Puckett, supra*, 391 F. Supp. 463 (W.D. Va.); *Van Horn v. Luckhardt, supra*, 392 F. Supp. 384 (E.D., Va.).

language and is contrary to prior judicial interpretations of that section.

The first sentence of Section 8-24, which sets forth the two-year limitations period applicable to actions for "personal injuries," was added by an amendment to that section in 1954. Va. Acts 1954, ch. 589. Prior to that time, such suits were governed by the limitations periods now contained in the second sentence of the section which is applicable to "[e]very personal action, for which no limitation is otherwise prescribed." See *Herndon v. Wickham*, 108 Va. 824, 97 S.E.2d 5, 7-8 (1957). The 1954 amendment did not change this general catchall provision. It continues to specify a five-year limitations period for a "personal action" which survives the death of a party, and a one-year period for one that does not.[4] The only effect of the 1954 amendment was to prescribe a limitations period of two years for a single category of tort actions – those involving "personal injuries." Both the statutory history and the context in which the term "personal injuries" is used teach that it must have been intended by the Virginia General Assembly to mean injuries of a physical or bodily injury. This commonsense interpretation of the statute was followed in a non-civil rights case, *Griggs v. Farmer*, 430 F.2d 638 (1970), aff'g., 314 F. Supp. 1185 (E. D. Va., 1969), where the Fourth Circuit held that the

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[4] The Supreme Court of Virginia follows the common law rule holding that the only actions that survive are those based on wrongs to property, real or personal or which grow out of breach of contract; actions for personal wrongs, apart from property or contract, do not survive. *Carva Food Corporation v. Dawley*, 202 Va. 543, 118 S.E.2d 664, 667 (1961). The limitations periods applicable to actions based on contract are contained in Section 8-13 of the Virginia Code (1950).

first sentence of Section 8-24 with its two-year limitations period was applicable to an action based on physical assault with resulting tortious bodily injury, whereas the catchall provision contained in the second sentence was applicable to a separate cause of action alleging breach of promise to marry with resulting mental anguish and humiliation. Other decisions similarly support the view that the two-year limitations period in Section 8-24 was intended by the Virginia General Assembly to apply only to actions based on physical injury, and that the court of appeals' application of that limitation to an action such as this, based on deprivations of constitutional rights, is erroneous. See *Carva Food Corporation v. Dawley, supra,* 202 Va. 543, 118 S.E.2d 664 (1961); *Travelers Insurance Company v. Turner,* 211 Va. 552, 178 S.E.2d 503 (1971); *Burton v. Terrell,* 368 F. Supp. 553, 557 (W.D. Va., 1973), and cases cited.

In *Almond v. Kent,* where the Fourth Circuit first held Virginia's two-year limitations period applicable to actions under the old civil rights laws, in that instance Section 1983, the court properly noted that in a suit based on constitutional rights the "right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law." 459 F.2d at 204. The court's observation was correct, but its conclusion was wrong, for, as we have seen, the court proceeded to apply the two-year limitations period to a civil rights action, rather than the five-year limitations period contained in the second sentence of Section 8-24. The five-year limitations period, it is true, is conditioned on the survivability of the action, and under the common law as construed by the Virginia court, an action for personal wrong is not survivable. However, this Court has held that because of their "extreme harshness'" common law rules concerning survival will not be interpreted as a

limitation on the relief available to one asserting rights guaranteed by Congressional enactment. *Cox v. Roth*, 348 U.S. 207, 210 (1955). Federal law favors survival in such instances, because "through legislative action" a "new property right or interest" has been created which was unknown at common law. *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 349 (1937). But whether the right created by federal statute is "deemed a personal or a property right, to deny the remedy on the theory of abatement would be 'perpetuation of a policy which has now had its day.' " *Sands v. Abelli*, 290 F. Supp. 677, 681 (S.D. N.Y., 1968), quoting *Van Beeck v. Sabine Towing Co., supra*, 300 U.S. at 351. Accord: *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733, 735 (C.A. 2, 1958). Constitutional rights, similarly, possess too high a priority in our scale of legal values to permit them to be circumscribed by the outmoded doctrine of survival. See *Moor v. County of Alameda*, 411 U.S. 693, 702, n. 14 (1973); *Brazier v. Cherry*, 293 F.2d 401 (C.A. 5, 1971), cert. denied, 368 U.S. 921; *Pritchard v. Smith*, 289 F.2d 153 (C.A. 8, 1961); *Hall v. Wooten*, 506 F.2d 564 (C.A. 6, 1974); *Spence v. Staras*, 507 F.2d 554, 557 (C.A. 7, 1974). Accordingly, where, as here, an action is brought in Federal Court in Virginia seeking redress for deprivation of such rights, the same five-year limitations period should be applicable to it that applies to all other "personal actions" that survive.

As seen from the case at bar, as well as those cited *supra*, note 2, the issue presented here is one which recurs frequently in the Federal Courts in Virginia. Because of the misinterpretation which those courts consistently give to the Virginia statute of limitations, persons seeking vindication of their constitutional rights are being continually deprived of the relief to which they are entitled. It is

therefore important for this Court to review the issue and prevent the error from being perpetuated.

II.

As shown *supra*, p. 4, the district court awarded attorneys' fees to plaintiffs totalling $2,000. Judge Haynsworth, writing the opinion for the court of appeals overturned the award, but the three judges who concurred in his action were the dissenters on the merits, so they would not have awarded attorneys' fees under any circumstances (*infra*, p. 23a). The three judges who dissented from the overturning of the district court's award of fees concluded that the defendants displayed "obdurate obstinancy" and that the award of fees was therefore warranted in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612, 1622 (1975), where this Court reaffirmed the "bad faith" exception to the recognized American rule against awarding attorneys' fees to a prevailing litigant. The dissenters in the instant case would have upheld the district court's award of fees on the basis of that court's finding and the evidence of record showing that the officials of the defendant schools "did not truthfully recount under oath the facts of the case" (*infra*, p. 22a).

Three witnesses testified for Fairfax-Brewster School – Captain Stuart Reiss, Chairman of the Board of Directors; Robert Reiss, his son and the school's Director; and Olga Reiss, Registrar and Robert Reiss' wife. All three testified in detail about the school's admission policies, that they had conferred together about Colin Gonzales' application for admission to the first grade and summer camp, and that he had been rejected for lack of educational qualifications (A. 149, 160-161, 166-167). The district court rejected

the testimony of all three of these witnesses as "unbelievable," finding that the reason for Colin's rejection was because he is black (*infra*, p. 39a). The district court's finding that the defense witnesses did not testify truthfully was based both on its evaluation of their credibility, as well as the contrary testimony of Mr. Gonzales, as corrborated by Mrs. Gonzales and the testimony of Mrs. Bryant, who testified that when she called Fairfax-Brewster School to inquire about its admission policies she was told that it would not accept blacks (*infra*, pp. 39a-40a).

The admission policies of Bobbe's Private School were testified to by its Superintendent, William Gates, who denied that blacks were excluded (A. 184, 186, 187-188). The district court discredited Gates, and relying on the contrary testimony of five witnesses, Mr. and Mrs. McCrary, Mr. Gonzales, Mrs. Bryant and Mr. Brooks, found that the school practiced racial discrimination (*infra*, p. 40a).

The false testimony given under oath on which these schools relied in an effort to conceal their racially discriminatory admission policies cannot be passed off as a failure of "perception or memory," as the court of appeals' majority suggests (*infra*, p. 18a). The testimony was given deliberately, and may not be condoned merely because the legal issue is novel. As the three dissenting court of appeals judges observed, "Such bad faith in the conduct of litigation is a pernicious form of obstinancy that can no more be tolerated than out-of-court bad faith" (*infra*, p. 22a). Where, as here, litigants in Federal District Court have relied on false testimony in an effort to defeat claimed deprivations of constitutional rights "the very temple of justice has been defiled," and "the entire cost of the proceedings could justly be assessed against the guilty parties." *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575,

580 (1946). The giving of such testimony, since it seeks to deceive the court, is an "unconscionable act" which warrants the awarding of attorneys' fees. *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745, 750 (C.A. 7, 1974), cert. denied, 95 S. Ct. 1398; *First National Bank in Sioux Falls v. Dunham*, 471 F.2d 712, 713 (C. A. 8, 1973). The important purpose served by an award of fees in such circumstances is that it aids the "effort to keep the course of justice free from the pollution of perjury." *Bronston v. United States*, 409 U.S. 352, 357 (1973).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLISON W. BROWN, JR.
Suite 437
3000 Connecticut Avenue, N.W.
Washington, D.C. 20008

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204

Attorneys for Petitioners

RODERICK V.O. BOGGS
Washington Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

Of Counsel

August 1975.

APPENDIX A

STATUTORY PROVISIONS

42 U.S.C. Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Virginia Code (1950):

Sec. 8-24. Of actions not before specified. – Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years, shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

Notwithstanding any other provision of law to the contrary, every action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, shall be brought within one year

next after the right to bring the same shall have accrued. (Code 1919, § 5818; 1954, c. 589; 1973, c. 385.)

APPENDIX B

[Filed April 15, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Defendants,

Southern Independent School Association,
Appellant.

No. 73-2349

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Appellants,

Southern Independent School Association,
Defendant.

No. 73-2350

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary,
Plaintiffs,

Colin M. Gonzales, infant by Raymond
Gonzales and Margaret R. Gonzales,
Appellants,

v.

Russell L. Runyon, Katheryn E. Runyon,
Southern Independent School Association,
Appellees.

No. 73-2351

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

No. 73-2352

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellants,

v.

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974. Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V.O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. § 1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

(continued)

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales' visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied

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[1] (continued) and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales' telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two-year-old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales' or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va., 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales' were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developed had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman - Reconstruction and Reunion, 1207, *et seq.* That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed

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[3] 14 Stat. 27.

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ***freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right

is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park, supra.* Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood v. Harrison*, 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not

direct recipients of public funds. Their actual and potential consistency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases in which damages for such injuries are denied.[5] That damages are recoverable for violations of § § 1981 and 1982 is established by *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, 240, in which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma

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[5] After the recent decision of the Virginia Supreme Court in *Womack v. Eldridge,* 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214 (1973).

which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy,"[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties

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[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1205 n. 5.

recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient.

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[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI, of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights stautes. We have recognized that a plaintiff under Title VII might recover attorney fees.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment. discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F.2d 143, (§§ 1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified*

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[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968, the Act applied to all dwellings, 42 U.S.C. § 3603(a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603(a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

on other grounds sub nom., Harper v. Kloster, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper v. Allen*, 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

exceptions applicable.[13]

AFFIRMED IN PART.
REVERSED IN PART.

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, had allowed attorney's fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award

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[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when dependants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"[14] of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have ot restricted the

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[14] *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorneys' fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States v. Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982, and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending prequisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

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[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C., 1971), the United States District Court for the Western District of North Caroline held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C. D., Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also, *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the Federal Government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post-Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, *et seq.* Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post-Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second-class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L. Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982, were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

made no attempt to prevent racial discrmination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: *i.e.*, (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).[4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

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[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalist*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we

(continued)

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational instutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social inteest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting[5] opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), stated, at p. 179, the proposition thus:

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4 (continued)

contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make a. d enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F. Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School at 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to

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[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, *et seq.*, citing Roecoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L. Rev. 471 at 478, 479 (1973), and 74 Col. L. Rev. 449, 468, 469 (1974).

be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of Section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in Section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination*, 74 Col. R. Rev. 449, at 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian

terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, *supra*, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972, 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first-class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these ap-

pellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necesary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a

religious school in *Pearce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

We would reverse the judgment of the district court on all points.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

[Filed May 29, 1975, by William K. Slate, II, Clerk]

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,	:
Appellees,	:
v.	:

Russell L. Runyon, Katheryne E. Runyon,
Defendants.

Southern Independent School Association,
Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the

> first sentence of Virginia Code § 8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five-year statute, the second sentence of § 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford*, 4th Cir. 462 F.2d 615; see *Almond v. Kent*, 4th Cir., 459 F.2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code § 8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorneys' fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allownace of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra*, 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

APPENDIX C

[Filed July 27, 1973]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al.*, *Plaintiffs,*	:	**Civil Action No. 494-72-A**
v.	:	
FAIRFAX-BREWSTER SCHOOL, INC., *Defendant,*	:	
and	:	
MICHAEL C. McCRARY, *et al.*, *Plaintiffs,*	:	
v.	:	**Civil Action No. 495-72-A**
RUSSELL L. RUNYON, *et al.*, *Defendants,*	:	

and :

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, :

Intervenor-Defendant. :

MEMORANDUM OPINION AND ORDER

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958, Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956, Fairfax-Brewster commenced operation of a summer day camp and in 1967, Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70, when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a

medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2-year-old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party defendant in the

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[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were conslidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly, the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. §

1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra*, at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* [Emphasis added.] *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the Opportunity to attend these schools was open to every white child. *Tillman*, at 4313 and 4314. It is difficult to accept the defendants 'argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.*, was cited to the contrary as an

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[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly, the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a, *et seq.*, it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, Sullivan v. Little Hunting Park has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

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[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL C. McCRARY, *et al.*,	:	
Plaintiffs,	:	**Civil Action No.**
v.	:	**495-72-A**
RUSSELL L. RUNYON, *et al.*,	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

Defendants have moved to dismiss this action as brought by three of the named plaintiffs contending that the statute of limitations has run.[1] This is a civil rights action seeking redress for the violation of the plaintiffs' rights resulting from racial discrimination practiced by the defendants in connection with the admission of children to Bobbe's Private School. 42 U.S.C. § 1981.

The injuries alleged and the relief sought in this case sound in tort. Although this is a 42 U.S.C. § 1981 rather than a § 1982 or § 1983 action, the applicable limitation is governed by *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972); *Allen v. Gifford*, 462 F.2d 615 (4th Cir.), cert. denied, sub nom.,

[1] The Motion to Dismiss raised other issues, as to all of which the motion was denied in an oral ruling from the bench after argument on April 6, 1973. The issue of the statute of limitations was taken under advisement.

Gifford v. Allen, 93 S. Ct. 128 (1972). In those cases Virginia's two-year statute of limitations was applied to personal injury suits based on racial discrimination. It is apparent that the damages claimed by Raymond and Margaret Gonzales, as parents of Colin Gonzales, are barred since the two-year statute of limitations began to run on June 15, 1969, more than two years before this suit was filed. The limitation period has not been tolled as to Colin Gonzales since it does not begin to run until he, a minor, attains the age of majority. *Davenport v. Deseret Pharmaceutical Company*, 321 F. Supp. 659, 660 (E.D. Va., 1971).

Accordingly, the claim of Raymond and Margaret Gonzales for damages is dismissed. The requests for declaratory and injunctive relief, based as they are on alleged continuing wrongs, are not dismissed; and it is so ordered.

/s/ ALBERT V. BRYAN, JR.
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 16th, 1973

APPENDIX E

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL C. McCRARY, infant by CURTIS L. McCRARY and SANDRA McCRARY and COLIN M. GONZALES, infant by RAYMOND GONZALES and MARGARET R. GONZALES,		
Appellees,		
v.		**No. 73-2349**
RUSSELL L. RUNYON, KATHERYNE E. RUNYON,		
Appellants,		
and		
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,		
Defendant.		

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was aruged by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE,II.
William K. Slate, II.
Clerk

[Filed April 15, 1975]

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JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL C. McCRARY, infant by CURTIS L. McCRARY and SANDRA McCRARY, *Plaintiffs,*	:	
COLIN M. GONZALES, infant by RAYMOND GONZALES and MARGARET R. GONZALES, *Appellants,*	:	
v.	:	**No. 73-2350**
RUSSELL L. RUNYON, KATHERYNE E. RUNYON,	:	
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Appellees.*	:	

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE,II.
William K. Slate, II.
Clerk

[Filed April 15, 1975]

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JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLIN M. GONZALES, infant by his parents, RAYMOND GONZALES and MARGARET R. GONZALES, *Appellees,*	:	
v.	:	**No. 73-2351**
FAIRFAX-BREWSTER SCHOOL, INC., *Appellant.*	:	

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II.
William K. Slate, II.
Clerk

[Filed April 15, 1975]

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLIN M. GONZALES, infant by his parents, RAYMOND GONZALES and MARGARET R. GONZALES, *Appellants,*	:	
v.	:	**No. 73-2352**
FAIRFAX-BREWSTER SCHOOL, INC., *Appellee.*	:	

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[Filed April 15, 1975]

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

No. 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL C. McCRARY, etc., *et al.*,
and
COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON
and
FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC., IN OPPOSITION

ANDREW A. LIPSCOMB
430 Washington Building
Washington, D.C. 20005
Counsel for Respondent
Fairfax-Brewster School, Inc.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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RUSSELL L. RUNYON, KATHERYNE E. RUNYON

and

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC., IN OPPOSITION

Fairfax-Brewster School, Inc., one of respondents herein, prays that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioners' statement as to this Court's jurisdiction to hear the Petition is accepted. It is this respondent's contention, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Petitioners' statement of questions presented is not acceptable in the form in which set forth because it is argumentative and states conclusions not supported by the facts. This respondent would restate each question as follows:

1. Whether Virginia's two-year statute of limitations which expressly applies to every action for personal injuries, or Virginia's five-year statute of limitations which expressly applies to every personal action for which no limitation is otherwise prescribed and which survives the death of the claimant, is the most nearly analogous Virginia statute of limitations applicable to a civil rights action brought under 42 U.S.C. § 1981.

2. Whether the mere fact that the district court believed the testimony of the Gonzaleses and their witnesses, and not the testimony of the respondent's witnesses, in a suit instituted more than three and one-half years after the discriminatory act complained of, brings this case within the "bad faith" exception to the American rule governing the award of attorneys' fees, under which such award is ordinarily denied in the absence of express contractual or statutory authorization.

ARGUMENT

I

In the first section of their Reasons for Granting the Writ, petitioners are in essence asking this Court to take jurisdiction for the purpose of giving a different interpretation to the statutes of limitation of Virginia than what is now the well-settled doctrine in that state.

Petitioners waited three years and seven months before filing suit under 42 U.S.C. § 1981. As a result, the claims of the adult petitioners against this respondent were held by the District Court to be barred by the two-year Virginia statute of limitations applicable to actions for personal injuries. This holding was affirmed unanimously by the Court of Appeals, sitting *en banc*. The statute not being a bar to the claim of the infant plaintiff, the district court awarded compensatory damages to him, and this ruling was affirmed by a majority of the panel, the minority dissenting on the broad issue as to the applicability of 42 U.S.C. § 1981 to a private school for children.

Petitioners contend that the term "personal injuries" as used in the statute is limited to physical or bodily injuries, and therefore the two-year statute governing actions for personal injuries is not applicable. None of the cases cited by petitioners so holds, and the contention is unreasonable on its face.

Almond v. Kent, 459 F.2d 200 (C.A. 4, 1972), involved a civil rights claim under 42 U.S.C. § 1983. In holding that the two-year statute governing actions for personal injuries was applicable to civil rights actions, the Court said, at page 203:

"Congress has not enacted a statute of limitations applicable to suits arising under § 1983. In such circumstances federal courts follow the limitations period fixed by the law of the state in which the district court is held. O'Sullivan v. Felix,

233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914). Unlike some other states, Virginia has not enacted a statute of limitations which is specifically made applicable to § 1983 suits.[3] We must, therefore, grapple with the Virginia general statute of limitations. 2. Va. Code Ann. § 8-24 (1957 Repl. Vol.), which the parties agree is the one to be applied. It reads:

> Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued . . . .

"The district court, after considering the statute and the case law construing it, held that the one-year period of limitations applied to all aspects of Almond's claims. In this appeal, no party seriously urges the correctness of this result. Almond suggests that his claim should be fragmented with the two-year period (beating and other personal injuries) and the five-year period (all other alleged causes of action, if any) each applying in part. Gaunce, Davis and Brown conceded that to the extent the complaint claims damages for personal injury, the two-year period applies, Greeson v. Sherman, 265 F. Supp.

"[3] See, for example, the reference to the Colorado statute in Salazar v. Dowd, 256 F. Supp. 220 (D. Col. 1966). Because of the rising tide of § 1983 suits against state officials and the difficulty of applying a statute enacted primarily to deal with different types of litigation, Virginia may well wish to consider the enactment of a similar statute."

340 (W.D. Va. 1967), but they argue that the five-year period is inapplicable, Westover Court Corporation v. Eley, 185 Va. 718, 40 S.E.2d 177 (1946), and that strong public policy dictates resort to the one-year period. Kent, because he is unaffected, takes no position.

"We agree that, to the extent that Almond's § 1983 complaint alleges a violation of his constitutional rights resulting in personal injuries of the type that would be actionable at common law, the Virginia two-year period unquestionably applies. But this is so, not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten. We think it follows that the Virginia two-year period applies to all other rights which may be redressed under § 1983 by the recovery of money damages. Section 1983 creates a federal cause of action, unknown at common law, '[for] the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]. . . .' This right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law. Barnes Coal Corp. v. Retail Coal Merchants Assn., 128 F.2d 645 (4 Cir. 1942). See also, Brazier v. Cherry, 293 F.2d 401 (5 Cir. 1961), cert. den., 368 U.S. 921, 82 S. Ct. 243, 7 L.Ed.2d 136 (1961); Pritchard v. Smith, 289 F.2d 153 (8 Cir. 1961). In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.' Under Virginia law, it is the object of litigation which determines the applicability of a statute of limitations not the form in which suit is instituted. Birmingham v. Chesapeake & Ohio Railway Co., 98 Va. 548, 37 S.E. 17 (1900); Friedman v. Peoples Service Drug Stores, 208 Va.

700, 160 S.E.2d 563 (1968). See also, Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969). Hence, our conclusion that the Virginia two-year period of limitations, applying to '*every* action for personal injuries" (emphasis added), applies generally to § 1983 suits.

"Even if we conclude that a § 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation, it is 'more serious than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a consitutional right.' Monroe v. Pape, 365 U.S. 167, 196, 81 S. Ct. 473, 488 (1961) (Harlan, J., concurring). Accordingly, we think that it more properly belongs at the two-year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period. See Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E.2d 177 (1946)."

Almond was followed in *Allen v. Gifford*, 462 F.2d 615 (C. A. 4, 1972), cert. denied, *sub nom., Gifford v. Allen*, 409 U. S. 876, involving a civil rights action under 42 U.S.C. § 1982. In the instant case, the seven-member panel of the Fourth Circuit was unanimous in holding that the two-year statute applied. At 515 F.2d 1082, 1097, the Court said:

> "While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the first sentence of Virginia Code Sec. 8-24, applicable to actions for personal injuries. It is contended on appeal that

> the judge should have applied Virginia's five-year statute, the second sentence of Sec. 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under § 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two-year statute. Allen v. Gifford, 4th Cir., 462 F.2d 615; see Almond v. Kent, 4th Cir., 459 F.2d 200. It is also contended that the five-year statute for actions on a contract, Virginia Code Sec. 8-13, applies, but it is clear that no action on a contract is involved." (Pet. 34a).

In *Johson v. Railway Express Agency*, 44 L.Ed.2d 295, 302 (1975) this Court, citing *O'Sullivan v. Felix*, 233 U.S. 318, 58 L.Ed. 980, 34 S. Ct. 596 (1914) (Civil Rights Act of 1871), *Auto Workers v. Hoosier Corp.*, 338 U.S. 696, 701-704, 16 L. Ed.2d 192, 86 S. Ct. 1107 (1966) (Labor Management Relations Act), and other decisions, said that since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under 42 U.S.C. § 1981, the controlling period would ordinarily be the most appropriate one provided by state law, and held that the one-year Tennessee statute which was by its terms applicable to Federal civil rights actions, was clearly and specifically applicable to a civil rights action under 42 U.S.C. § 1981 instituted in Tennessee. *Johnson* would appear to be dispositive of this portion of petitioners' Reasons for Granting the Writ. The Court of Appeals was plainly right in applying Virginia's two-year statute of limitations to the claim of Mr. and Mrs. Gonzales.

Finally, it is submitted that this contention of the adult Gonzaleses does not raise an important issue of general public interest or application, but an issue that affects themselves

alone, stemming from their own neglect and failure to file the action within the entirely reasonable and appropriate two-year limitation period.

II

The second ground upon which petitioners seek certiorari would introduce a new and frightening concept into the law. Every losing party whose version of the facts is not accepted by the court or jury which heard the testimony would *ipso facto* become a perjurer and liable for payment of the attorneys' fees of the prevailing party. Not surprisingly, petitioners have nothing in point in the way of precedent to offer in support of their contention. And they resort to exaggeration and very loose language in their efforts to bring the facts of this case within the holdings or rationale of the cases they cite.

They refer to a comment in *Aleyska Pipeline Serv. v. Wilderness Society*, 44 L.Ed.2d 141, 154, that "'a court may assess attorneys' fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'", quoting from *F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 40 L.Ed.2d 703, 94 S. Ct. 2157. But in the instant case there was no charge, finding or conclusion by the district court that the respondent had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

They refer to "the district court's finding that the defense witnesses did not testify truthfully," but there was no such finding.

They refer to "false testimony given under oath", but there was no finding or statement by the district court that any of the defense witnesses had testified falsely.

They cite *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575 (1946) as though it supported their contention when in fact it does nothing of the kind. This Court in *Universal* did

not award counsel fees and the case did not involve merely the question of whose testimony was believed by the trier of the facts. It involved the question of a judgment obtained by fraud. What this Court said in *Universal,* probably by way of dictum, was that if the court in which a judgment was fraudulently obtained conducts a proper hearing to investigate the matter, and finds after such proper hearing that "fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties", and that in such a case a court may assess counsel fees as part of the taxable costs. (328 U.S. at 580).

Petitioners cite *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745 (C.A. 7, 1974), an action brought under 45 U. S.C. § 285, which provides:

> "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

The district court in *Skil* awarded attorneys' fees because the testimony of the losing party's president and principal stockholder was, in the words of the court:

> ". . . contrary to his company's prior position and contrary to all documentary evidence. The disengenuousness of his testimony on this subject impressed this court at the time as a gross disregard of the facts, if not bad faith, and as an ill-advised attempt to salvage an invalid patent." (503 F.2d at 750).

The Seventh Circuit in affirming said, at page 750:

> ". . . accepting, as we do, the District Court's findings with respect to Matthews' testimony, that testimony amounted to an unconscionable act done

> with deceptive intent and was a sufficient basis for an award of attorneys' fees."

Petitioners cite *First National Bank in Sioux Falls v. Dunham*, 471 F.2d 712 (C.A. 8, 1973), in which the district court awarded attorneys' fees against the losing party under Rule 54(d) of the Federal Rules of Civil Procedure. The aggravated circumstances in that case are set forth in the opinion of the Circuit Court, at page 713:

> "Judge Lord states in his opinion that the award of attorneys' fees was made for 'dominating reasons of justice' and because L.T. Dunham's conduct made it necessary for the plaintiff to litigate with third parties in order to enforce his judgment. The record reveals that L.T. Dunham has attempted to conceal assets, that he has made fraudulent conveyances subsequent to the instigation of litigation in South Dakota, an l that he engaged in extensive evasive and dilatory tactics that tended to delay and hinder the trial court. In addition, the record reveals that Thomas Dunham gave misleading testimony at the urging of L.T. Dunham, that L.T. Dunham attempted to bribe a handwriting expert and that certain records were falsified for trial. On the basis of this record, we find no abuse of discretion on the part of Judge Lord in awarding the attorneys' fees."

Finally, petitioners cite *Bronston v. United States*, 409 U. S. 352 (1973), which did not involve the question of awarding attorneys' fees against the losing party because his version of the facts was not accepted at trial, but the question of whether or not a particular perjury conviction was proper.

No other cases were cited by petitioners in support of the second section of their Reasons for Granting the Writ.

The Court of Appeals in the instant case disposed of this contention of petitioners in the following language:

> "The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.
>
> "We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying 'obstinate obduracy'. Brewer v. School Board of City of Norfolk, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of 'obstinate obduracy',[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revised statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of the litigation." (515 F.2d 1082, 1089, Pet. 17a).

"6. In refusing punitive damages, the district court found that the defendants had not 'acted recklessly or willfully in disregard of clear existing law.' 363 F. Supp. at 1205 n. 5."

With respect to this contention of the petitioners, as with their first one, the Court of Appeals was plainly right in its ruling. Petitioners have failed to present substantial or even plausible arguments for the granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW A. LIPSCOMB
430 Washington Building
Washington, D.C. 20005
Counsel for Respondent
Fairfax-Brewster School, Inc.

September, 1975.

Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

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FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

RODERIC V.O. BOGGS
Washington Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

Of Counsel

ALLISON W. BROWN, JR.
Suite 301
1345 E Street, N.W.
Washington, D.C. 20004

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204

Attorneys for Petitioners

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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42 U.S.C. Sec. 1982 . . . . . 21, 24

42 U.S.C. Sec. 1983 . . . . . 24, 25, 29, 30

42 U.S.C. Sec. 1988 . . . . . 10, 19, 20, 21, 22, 30

42 U.S.C. Sec. 2000a 22

42 U.S.C. Sec. 2000e 18, 22

42 U.S.C. Sec. 3612(c) 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-306

MICHAEL C. McCRARY, etc., *et al.*,

and

COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON AND KATHERYNE E. RUNYON, d/b/a BOBBE'S PRIVATE SCHOOL,

and

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS[1]

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion (A. 4-34, 40-42)[2] are reported

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[1] Petitioners herein, in addition to Michael C. McCrary and Colin M. Gonzales, infants who sued through their respective parents, include their parents, Curtis L. McCrary and Sandra McCrary, and Raymond Gonzales and Margaret R. Gonzales.

By order of the Court, the instant case is consolidated with Nos. 75-62, 75-66 and 75-278. All four cases seek review of the same proceeding below.

[2] "A" refers to the single appendix. References preceding a semicolon are to findings of the courts below; those following are to the supporting evidence.

at 515 F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973 (A. 133-142) is reported at 363 F. Supp. 1200. A memorandum opinion and order of the district court which issued April 16, 1973 (A. 119-120) is unreported.

JURISDICTION

The judgments of the court of appeals in the consolidated cases below (A. 35-39) were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals filed on May 29, 1975 (A. 40-42). The petition for a writ of certiorari in No. 306 was filed on August 27, 1975, and was granted on November 11, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an award of attorneys' fees to petitioners is warranted in the circumstances of this case as part of the equitable remedy.

2. Whether a civil rights action brought under 42 U.S.C. Sec. 1981 is subject to Virginia's two-year statute of limitations applicable to an action based on physical or bodily injury, or whether such an action is more properly subject to the five-year limitations period generally applicable to a "personal action" which survives the death of a party.

STATUTES INVOLVED

42 U.S.C.

Sec. 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

* * *

Sec. 1988.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

* * *

Virginia Code (1950)

Sec. 8-24. Of actions not before specified. – Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years, shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

Notwithstanding any other provision of law to the contrary, every action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, shall be brought within one year next after the right to bring the same shall have accrued. (Code 1919, § 5818; 154, c. 589; 1973, c. 385.)

STATEMENT

This proceeding arises out of two cases that were consolidated in the district court and in the court of appeals. The plaintiffs in both cases are Negro children and their parents who seek relief for violation of their civil rights guaranteed by the Thirteenth Amendment to the Constitution, as implemented by 42 U.S.C. Sec. 1981. The courts below upheld plaintiffs' contentions that the defendant schools, Fairfax-Brewster School, Inc., and Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, violated plaintiffs' rights under 42 U.S.C. Sec. 1981 by denying admission to the two children, Colin M. Gonzales

and Michael C. McCrary because of their race or color. The relevant facts, as found by the district court and affirmed by the court of appeals, are as follows:

A. Fairfax-Brewster School – its racially discriminatory admission policy

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program consisting of pre-primary through sixth grade, as well as a summer camp program (A. 7; 59). In the 1972-1973 academic year the school had an enrollment of 223, and in 1972 the camp enrollment was 236 (A. 134; 60). Fairfax-Brewster School does not receive governmental funds or assistance and is supported entirely by tuition paid by the families of students (A. 134). It solicits students by advertising in the Yellow Pages of the telephone directory and by direct mail advertising addressed to "Resident" at specified addresses (A. 7; 74, 176).

In early May 1969, Mr. and Mrs. Gonzales contacted Fairfax-Brewster about enrolling their son, Colin, age 5-1/2, in the school's summer day camp program and continuing in the first grade in the fall (A. 7; 176-177). The Gonzales' had learned of the school through its advertisement in the Yellow Pages, through an advertisement received in the mail, and from a friend whose son had attended the summer camp. Thereafter, the Gonzales' visited the school with Colin and were shown around (A. 7-8; 177-179). Being pleased with what they saw, the Gonzales' completed the application form for admission, and submitted it along

with a required medical certificate prepared by their doctor and a registration fee (A. 8; 180).[3]

On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given (A. 8; 73). Mr. Gonzales then called the school and spoke to someone identified as Captain Stuart A. Reiss, Chairman of the Board.[4] In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told "we are not integrated" (A. 8; 166, 210-211).

Fairfax-Brewster School's policy of excluding Negroes was corroborated by Mrs. Marjorie Bryant, who, in January 1972, telephoned the school about enrolling her 4-year-old son, Grady Bryant (A. 10; 221-222). When Mrs. Bryant indicated that her son was black, she was told he could not attend the school because of his race (A. 10; 222-223).

B. Bobbe's Private School – its racially discriminatory admission policy

Bobbe's Private School is located in Arlington County, Virginia, where it operates a school program consisting of pre-primary through second grade, as well as a summer camp program (A. 134; 258). The school's average enrollment is 200 pupils and the average camp enrollment is 100

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[3] The application form as well as the acceptance form used by the school specify in detail the terms of what is designated as the "Enrollment Contract" between the parties (A. 63-66, 70-72).

[4] Captain Reiss' son, Robert S. Reiss is Director of the school, and his daughter-in-law, Olga M. Reiss, is Registrar (A. 8; 239, 246).

(A. 134; 108, 112). Bobbe's School does not receive governmental funds or assistance and relies for funding entirely on tuition paid by the families of students (A. 134). The school advertises in the Yellow Pages of the telephone directory and also solicits students by direct mail advertising (A. 136; 212, 220-221, 223, 226-227).[5]

In mid-May 1969, subsequent to Colin Gonzales' rejection by Fairfax-Brewster School, Mr. Gonzales, responding to the advertisement of Bobbe's School in the classified directory, telephoned the school (A. 8; 212). Mr. Gonzales stated that he was interested in enrolling his son and in response to his inquiry as to whether the school was integrated was told by the spokesman that only members of the Caucasian race were accepted (A. 8; 212-213).

In August 1972, Mrs. Sandra McCrary, in response to the advertisement of Bobbe's School in the classified directory, telephoned the school about enrolling her 2-year old son, Michael, in the nursery school program (A. 8; 226-227). After first inquiring about the cost, the program, meals, transportation and facilities for "toilet training", she asked if the school was integrated (A. 8; 227). Upon receiving a negative reply, she asked if the school accepted black children. The answer again was "no" (A. 8; 227-228).

The policy of Bobbe's Private School of excluding blacks was corroborated by Mrs. Marjorie Bryant, who, in January 1972, after being turned away by Fairfax-Brewster School, called Bobbe's School about enrolling her 4-year-old son,

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[5] As part of enrolling a child in Bobbe's School completed application and medical forms must be furnished by the parents (A. 143, 148A).

Grady (A. 10; 223). When she indicated that her son was black, Mrs. Bryant was told he could not attend the school because of his race (A. 10; 224).

Similarly, Mr. Marshall Brooks, who works for the Navy Department and is Mrs. McCrary's supervisor, called Bobbe's School after he became aware of the pendency of this suit, to find out for himself about the school's policy (A. 10; 263-264). In a telephone conversation on May 31, 1973, with the school's superintendent, William C. Gates, Brooks asked whether the school was integrated (A. 10; 264-265). Upon receiving a negative response, Brooks further asked if blacks were admitted. He was told "no" (A. 10; 265).

C. Proceedings below

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees (A. 142). The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950) (A. 119-120).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to support the district court's findings that Colin Gonzales and Michael McCrary were excluded from the two schools on grounds of race (A. 10). The court of appeals also agreed with the district court's conclusion that plaintiff's rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claim was barred by Virginia's two-year statute of limitations (A. 17-18, 41). Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant (A. 18-22, 24, 42). The dissenting judges felt that the award of fees was justified by the district court's finding that officials of the defendant schools did not testify truthfully concerning their discriminatory practices.

SUMMARY OF ARGUMENT

I.

By relying on witnesses who "did not truthfully recount under oath the facts of the case" (A. 24), the defendant schools sought to conceal their racially discriminatory conduct from the district court. Deception of this nature inevitably prolongs litigation and constitutes a fraud upon the court. Resort to such litigating tactics by the defendants should not be condoned, and warrants their being assessed with attorneys' fees under the "bad faith" exception to the rule generally observed by American courts that such fees are not awarded to a prevailing litigant.

Even apart from the untrue testimony of defendants' witnesses, racial discrimination itself has been recognized as a form of bad faith which justifies awarding attorneys' fees to the victim who is required as a result to undertake expensive litigation in order to vindicate his rights. The racial discrimination practiced by the defendant schools had no relevancy to their educational programs, and hence was completely irrational and without justification. Public policy in this country, as expressed both in judicial decisions and legislative enactments, condemns racial discrimination as being odious to the concept of freedom and equality which underlies our democratic institutions. Further, there can be no doubt that racial discrimination has an oppressive effect on its victims. This has been judicially recognized, and is also confirmed by studies showing the psychological and emotional injury that discrimination has caused American Negroes. Because of the inherently oppressive nature of racial discrimination, therefore, a litigant who establishes that he has been victimized by such conduct and that he is therefore entitled to judicial relief should be awarded attorneys' fees as part of his equitable remedy.

In addition to the equitable grounds for awarding attorneys' fees to plaintiffs in this case, a statutory basis also exists in 42 U.S.C. Sec. 1988. Both Sec. 1988 and Sec. 1981, upon which this suit is based, were part of the Civil Rights Act of 1866. Sec. 1988 is a uniquely broad commission to the federal courts in civil rights cases to adopt from the remedies employed elsewhere in federal or state law those provisions most suitable for effectuating the substantive rights guaranteed by Sec. 1981. Before looking to state laws, Sec. 1988 requires a court in a civil rights case to canvass federal laws for remedies which will most fully effectuate the substantive right at issue. Sec. 1981 is like the modern civil rights laws enacted over the past decade in that it is not self-

enforcing, but depends on private-citizen enforcement. In order for such enforcement to be effective, persons who are discriminated against must be encouraged to seek judicial relief, and both Congress and this Court have recognized that this purpose is served by allowing for recovery of attorneys' fees. Without the prospect of such awards few plaintiffs are in a position to undertake the often complex, prolonged and unpopular litigation that may be required to enforce the constitutional and statutory guarantees against discrimination. Since Congress has specifically provided in the modern civil rights laws for awards of attorneys' fees to the prevailing litigant, Sec. 1981 requires that such awards be included as part of the remedy available in Sec. 1981 suits.

II.

This the latest of a significant number of cases where the Fourth Circuit and the district courts in Virginia have erroneously interpreted that state's statute of limitations to hold that a two-year limitations period, rather than a five-year period, applies to actions brought under the Reconstruction civil rights laws. In holding that Mr. and Mrs. Gonzales' claims for damages were barred by Virginia's two-year statute of limitations the courts below not only misconstrued the terms of the statute, but gave it a reading contrary to that given in non-civil rights cases.

Since there is no federal statute of limitations applicable to this Sec. 1981 action, the appropriate period provided by state law is controlling. The courts below held that the case is controlled by the first sentence of Sec. 8-24 of the Virginia Code (1950) (*supra*, p. 4) which specifies a two-year limitations period for an action for "personal injuries." However, the history of that section, an earlier decision of the Fourth Circuit, as well as decisions of the Supreme Court of

Virginia indicate that the phrase "personal injuries" has reference to injuries of a physical or bodily nature. Obviously, the instant case is not a tort action seeking redress for "personal injuries," but rather, is an action seeking vindication of basic federal rights guaranteed by the Constitution and an Act of Congress.

It is clear, therefore, that this action falls within the second sentence of Sec. 8-24 of the Virginia Code, which applies to "[e]very personal action for which no limitation period is otherwise prescribed." An action falling within this category is subject to a five-year limitations period if it is "for a matter of such nature that in case a party die it can be brought by or against his representative" – in other words, if it is survivable. If a "personal action" is of a type which does not survive the death of one of the parties, the prescribed limitations period is one year. The Virginia courts follow the common law rule that in order to survive the death of a party an action must be based on injury to real or personal property, or grow out of violation of a contract right. There is authority for the view that a Sec. 1981 action is based on a violation of contract rights and hence, is survivable under common law principles. In that event the five-year limitations period contained in Sec. 8-24 should be applied. However, the decisions of this and other courts indicate that a Sec. 1981 action is survivable without regard to common law doctrine, because it involves fundamental federal rights. The common law rule abating an action on the death of a party is generally regarded as one of the "archaisms of the law," and therefore it has been held to have no application to an action such as this based on a federal statute. The federal civil rights laws, particularly, should be given a broad liberal interpretation and it would be inconsistent with the congressional purpose to allow their effectiveness to be circumscribed by the outmoded doctrine of non-

survival. Accordingly, Virginia's five-year period of limitations is applicable to this proceeding, and the Gonzales' claims for compensatory damages should not have been disallowed by the courts below.

ARGUMENT

I. AN AWARD OF ATTORNEYS' FEES TO PETITIONERS IS WARRANTED IN THE CIRCUMSTANCES OF THIS CASE AS PART OF THE EQUITABLE REMEDY.

The district court, as shown *supra*, pp. 8-9, awarded attorneys' fees to petitioners totalling $2,000, but this award was overturned by the court of appeals. Three of the appeals court judges dissented on the ground that the award of fees was warranted under the so-called "bad faith" exception to the American rule which ordinarily precludes awarding attorneys' fees to a prevailing litigant. The dissenters were of the opinion that the district court's award of fees was justified by that court's finding that the officials of the defendant schools "did not truthfully recount under oath the facts of the case" (A. 24). This conduct, the dissenters stated, constituted "bad faith" of a form "that can no more be tolerated than out-of-court bad faith" *(ibid.)*. In these circumstances, the dissenters concluded, the district court's award of attorneys' fees to plaintiffs was warranted on the basis of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975), where this Court reaffirmed the bad faith principle concerning awards of such fees.

The testimony concerning Fairfax-Brewster School's admission policies that the district court refused to credit was given by three witnesses – Captain Stuart Reiss, Chairman of the Board; his son, Robert Reiss, who is the school's Director; and Captain Reiss' daughter-in-law, Olga Reiss, who is the Registrar. All three of these individuals testified in detail

about the school's admission policies, stating that they had conferred together about Colin Gonzales' application for admission to the first grade and summer camp and that he had been rejected for lack of educational qualifications (A. 243-244, 247, 250-251). The district court found the testimony of the three witnesses to be "unbelievable," and concluded that the reason for Colin's rejection was his race (A. 135). The district court's rejection of the testimony of these witnesses was based both on its evaluation of their credibility, as well as the contrary credited testimony of Mr. Gonzales, as corroborated by Mrs. Gonzales, and the testimony of Mrs. Bryant, who testified that when she called Fairfax-Brewster School to inquire about its admission policies she was told that it would not accept blacks.

The admission policies of Bobbe's Private School were described by Superintendent William Gates, who denied that blacks were excluded (A. 258-259, 260, 261). The district court discredited Gates, and, relying on the contrary testimony of five witnesses, Mr. and Mrs. McCrary, Mr. Gonzales, Mrs. Bryant and Mr. Marshall Brooks, found that the school practiced racial discrimination (A. 136-137).

There are three compelling reasons for awarding attorneys' fees to plaintiffs in this case. They are each well grounded in legal authority and taken either separately or collectively, as we show below, they provide ample basis for such an award.

The first reason for an award of attorneys' fees is that expressed by the three dissenting judges of the court of appeals who felt that such an award was warranted because the defendants exhibited "bad faith in the conduct of the litigation" by relying on witnesses who did not testify truthfully. This Court indicated in the *Alyeska* case that bad faith in the con-

duct of litigation can be a proper basis for awarding attorneys' fees, citing as an example (421 U.S. at 259) the decision in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). In that case it was discovered that a judgment had been fraudulently obtained, and following an investigation and proceeding to invalidate it, the party that had obtained the judgment was assessed with costs, including attorneys fees. This Court affirmed, holding that an assessment of fees is proper when a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled" 328 U.S. at 580. It cannot be doubted that the "temple of justice" was defiled in the instant case when the witnesses untruthfully testified that the defendants did not practice racial discrimination. By thus concealing the truth, defendants sought to deceive the court and thereby obtain a favorable ruling.[6] Clearly, such conduct should not be condoned, for the giving of false testimony with deceptive intent is "an unconscionable act," as the Seventh Circuit held in sustaining an award of attorneys' fees in *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745, 750, cert. denied, 420 U.S. 974.[7]

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[6] It is impossible to see how the untrue testimony given by the defense witnesses could have resulted from a failure of "perception or memory," as the court of appeals majority suggests (A. 19). These witnesses were the owners and managers of the schools in question and they knew whether the schools did or did not discriminate on the basis of race. They knew what the truth was and yet they consciously gave false testimony. This is far different than where a witness unintentionally gives false testimony as the result of faulty "perception or memory." Obviously, in such circumstances there is no bad faith warranting an assessment of attorneys' fees.

[7] As exemplified by the *Skil* case, a bad faith test is applied in determining when to award attorneys' fees under the patent laws which provide for their award to the prevailing party in "exceptional cases." 35 U.S.C. Sec. 285.

Accord: *First National Bank in Sioux Falls v. Dunham*, 471 F.2d 712, 713 (C.A. 8, 1973). Moreover, a party's reliance on witnesses who present false testimony will almost inevitably prolong litigation by making it more difficult for the opposing side to establish the truth, either by means of cross-examination or the introduction of rebuttal evidence. "Dilatory" and "vexatious" litigating tactics in themselves have been held to evidence bad faith and to afford a basis for awarding attorneys' fees. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (C.A. 2, 1973); *Kinnear-Weed Corporation v. Humble Oil & Refining Co.*, 441 F.2d 631, 636-637 (C.A. 5, 1971); *Thonen v. Jenkins*, 517 F.2d 3, 6 (C.A. 4, 1975).

It is particularly significant that the untrue testimony here was given in an effort to conceal defendants' racially discriminatory conduct, for racial discrimination has itself been expressly recognized as one of the manifestations of bad faith which justifies awarding fees to the victim who, in order to obtain redress, is required to undertake expensive litigation. In the *Aleyeska* case (421 U.S. at 258-259), this Court reaffirmed its earlier holding that an award of attorneys fees is appropriate "when the losing party has 'acted in bad faith, vexatiously wantonly, or for oppressive reasons . . .' " citing *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). In the *Rich* case, and in other authorities relying on this definition of the bad faith principle[8] the cases cited as the basis for the statement invariably include *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (C.A. 4, 1951). *Rolax* is the only authority among those cited where a party's

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[8] See *Hall v. Cole*, 412 U.S. 1, 5 (1973); 6 Moore, Federal Practice Par. 54.77[2], p. 1709.

"oppressive" conduct was held to justify awarding attorneys' fees to the opposing side – the conduct at issue there being racial discrimination practiced by a labor organization toward its Negro members. In *Rolax* a distinguished panel of judges (Parker, Soper and Dobie, J.) held that because the plaintiffs had been subjected to "discriminatory and oppressive conduct" by the labor organization and were required to conduct expensive litigation to vindicate their rights, it was within the "power of equity" to award them counsel fees. 186 F. 2d at 481. Accord: *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

The court of appeals in *Rolax* referred to the racial discrimination practiced there as "obviously irrelevant and invidious." 186 F.2d at 478. The same characterization is equally applicable here, for the discrimination against Negro children practiced by the defendant schools is wholly irrelevant to the educational programs that they purport to provide. Hence, the discrimination practiced was irrational and without justification. These are factors warranting consideration by a court of equity relative to the question of attorneys' fees.[9]

The Fourth Circuit's description of racial discrimination as "oppressive" (*Rolax*, 186 F.2d at 481) reflects a view that parallels this Court's. For, "[o]ver the years this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"

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[9] The mere fact that no court had held that racial discrimination by a private school was unlawful did not justify defendants' conduct. The belief that racially discriminatory is lawful does not excuse it if it is in fact proscribed, nor deprive the victim of appropriate redress. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-423 (1975).

Loving v. Virginia, 388 U.S. 1, 11 (1967). Elimination of racial discrimination as it has been practiced in our society has been a major objective of governmental policies in recent years. Although racial discrimination still exists, it has fewer defenders than once was the case. Its destructive effect on social and economic institutions in the society is now widely recognized.[10] And there is no longer any doubt of the "oppressive" effect that it has on its victims. Numerous authorities attest to the psychological and emotional injury that discrimination has caused American Negroes.[11] In short, plaintiffs submit that the *Rolax* case, as it has been incorporated into, and become one of the bases for, the bad faith exception to the American rule regarding attorneys' fees provides ample support for awarding such fees to plaintiffs in this proceeding.[12]

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[10] For example, as this Court has noted, Title VII of the Civil Rights Act of 1964 (42 U.S.C. Secs. 2000e, *et seq.*) was enacted by Congress "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

[11] Proshansky and Newton, The Nature and Meaning of Negro Self-Identity (Ch. 5 in Deutch, Katz and Jenson, Social Class, Race and Psychological Development, 1968); Katz, Negro Performance in Interracial Situations (Ch. 11 in Watson, Psychology and Race, 1974). And see generally Wilcox, The Psychological Consequences of Being a Black American: A Sourcebook of Research by Black Psychologists (1971); Coles, Children of Crisis (1967).

[12] If the instant case, because it is based on racial discrimination, is held to be like *Rolax*, an award of attorneys fees to plaintiffs covering the trial as well as each succeeding stage of the proceeding would be warranted. *Rock v. Norfolk and Western Ry Co.*, 473 F.2d 1344, 1350 (C.A. 4, 1973), cert. denied, 412 U.S. 933; *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 455 (C.A. 5, 1973); *Reed v. Arlington Hotel*

(continued)

As further ground for their contention that they should be awarded attorneys' fees, plaintiffs refer the Court's attention to a statutory provision which, they submit, provides authority for an award of significant fees in an action to enforce the rights guaranteed by 42 U.S.C. Sec. 1981.[13] Although Sec. 1981 contains no reference to remedies, 42 U.S.C. Sec. 1988, *supra*, p. 3, does.[14] Sec. 1988 embodies a uniquely broad commission to the federal courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the sub-

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[12] (continued) *Co.*, 476 F.2d 721, 726 (C.A. 8, 1973), cert. denied, 414 U.S. 854. On the other hand, if the untrue testimony of their witnesses is held to constitute the only manifestation of defendants bad faith, a court might consider itself obliged to limit attorneys' fees to the trial. Significantly, however, defendants' appeals were devoted in large part to efforts to overturn the trial court's credibility determinations. Cf. *Wright v. Jackson*, 522 F.2d 955 (C.A. 4, 1975).

It might be noted that the services of counsel have been provided for plaintiffs in this litigation through the Washington Lawyers' Committee for Civil Rights Under Law. The important role played by this and similar organizations in helping persons unable to afford legal representation to obtain vindication of their civil rights has been recognized in numerous instances. *Fairley v. Patterson*, 493 F.2d 598, 606-607 (C.A. 5, 1974); *Thompson v. Madison County Board of Education*, 496 F.2d 682, 689 (C.A. 5, 1974); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092 (C.A 7, 1975); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1146-1148 (C.A. 4, 1975).

[13] In *Alyeska* (421 U.S. at 255-256) the Court concluded that 28 U.S.C. Sec. 1923 limits to a nominal amount the size of attorneys fees that can be awarded by a federal court in the absence of express statutory authority. In an action such as this the limit would appear to be $20, 28 U.S.C. Sec. 1923(a).

[14] Both sections were originally part of the same statute – the Civil Rights Act of 1866, Sections 1 and 3, respectively.

stantive provisions of Sec. 1981 and other civil rights statutes. *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973).

The Congress which framed Sec. 1988 had little experience in fashioning statutory remedies for federal substantive rights in general and no experience with enforcing the rights originating in the newly adopted Thirteenth Amendment. Sec. 1988 granted authority to the courts in civil right cases to adopt from the remedies employed elsewhere in federal or state law those provisions most suited to providing full and effective relief. Cf. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418. Applied to a Sec. 1981 action, Sec. 1988 requires, first, that a review be made of relevant "laws of the United States" to determine whether any contain a remedy which, if applied to the case at hand, would be "suitable to carry . . . into effect" the civil right at issue. Sec. 1988 does not require looking to laws that are literally applicable; such a command would be superfluous. Rather, the provision speaks more broadly of a court's exercising its powers in civil rights cases "in conformity" with other laws – a phrase which contemplates the adoption of remedies even from other areas of the law. The rule of decision is thus to be chosen, not according to what provision is technically applicable, but according to what remedy will most fully effectuate the substantive right at issue.[15]

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[15] Congressman Wilson, who sponsored Sec. 1988, contemplated that remedies might be adapted from the Fugitive Slave Act. 36 Cong. Globe, 39th Cong., 1st Sess., 1118 (1866). Sec. 1988 was described in *Tennessee v. Davis*, 100 U.S. 257, 299 (1880) as "no more than a direction to a judge sitting in such a [civil rights] case to conduct the same as well as he can." Congressman Kerr, in opposing the adoption of Section 1988, urged (36 Cong. Globe, 39th Cong., 1st Sess. 1271 (1866):

(continued)

If no suitable remedy can be adapted from federal law, Sec. 1988 calls for a similar inquiry to be made among the laws of the state where the court is situated.

Both Sec. 1981, which was adopted by Congress in 1866, and the modern civil rights laws enacted over the past decade, in addition to having the common objective of proscribing invidious discrimination, are also alike in their dependence on private-citizen enforcement of the fundamental rights involved. Both Congress and this Court have recognized that in order for civil rights legislation of this type to be effective there must be vigorous private enforcement with remedies which include provision for the recovery of attorneys' fees. Awards of attorneys' fees are needed "to encourage individuals injured by racial discrimination to seek judicial relief." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Without the prospect of such awards few plaintiffs would be willing or able to handle the often complex, prolonged and unpopular litigation that may be required to enforce the constitutional and statutory guarantees against discrimination *Ibid.* While awards of counsel fees may remain the exception in other areas of the law,

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15 (continued)

> [T]he things attempted to be prohibited [by Secs. 1981-1982] are in themselves so extraordinary and anomolous, so unlike anything ever attempted before by the Federal Government, that the authors feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions in this bill, and not to be thwarted by this difficulty, they confer upon the courts the power of judicial legislation, the power to make such other laws as they may think necessary.

these considerations have prompted Congress to expressly mandate such awards in the principal civil rights measures that it has enacted in the past decade.[16]

Accordingly, in the inquiry required by Sec. 1988 for the most suitable remedies to be applied in Sec. 1981 actions, it is appropriate, if not necessary, that these recent expressions of congressional intent be heeded. Since attorney fee awards have been made a conventional remedy available generally under civil rights legislation, Sec. 1988 requires the courts to apply the same remedy in Sec. 1981 actions. It is difficult to see how any other construction of Sec. 1988 is possible. Cf. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (C.A. 5, 1971).

II. A CIVIL RIGHTS ACTION BROUGHT UNDER 42 U.S.C. SEC. 1981 IS NOT SUBJECT TO VIRGINIA'S TWO-YEAR STATUTE OF LIMITATIONS APPLICABLE TO AN ACTION BASED ON PHYSICAL OR BODILY INJURY, BUT RATHER IS SUBJECT TO THE FIVE-YEAR LIMITATIONS PERIOD GENERALLY APPLICABLE TO A "PERSONAL ACTION" WHICH SURVIVES THE DEATH OF A PARTY

As shown in the Statement, although the courts below held that the plaintiffs were entitled to recover compensatory damages from the defendants, Mr. and Mrs. Gonzales' claims were denied on the ground that they were barred by Virginia's two-year statute of limitations applicable to actions for "personal injuries." Sec. 8-24, Code of Virginia (1950). The

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[16] See, *e.g.*, 42 U.S.C. Sec. 2000a-3(b) (public accommodations); 42 U.S.C. Sec. 2000e-5(k) (employment); 42 U.S.C. Sec. 3612(c) (housing); Public Law 94-73, 94th Cong. 1st Sess. (1975) Sec. 402 (voting); 20 U.S.C. Sec. 1617 (education).

court of appeals held that the Gonzales' claims were "entirely referrable to injured feelings and humiliation" (A. 41) and that it regarded "such claims asserted under the Reconstruction Acts to be governed by Virginia's two-year statute," citing, *Almond v. Kent*, 459 F.2d 200, 203-204 (C.A. 4, 1972); *Allen v. Gifford*, 462 F.2d 615 (C.A. 4, 1972), cert. denied, *sub nom., Gifford v. Allen*, 409 U.S. 876. Plaintiffs submit that the court of appeals erroneously resolved the statute of limitations issue in this case and that, for reasons shown herein, the Gonzales' damage claims should have been allowed because, although their suit was filed three and one-half years after the discrimination against them occurred, it was within the five-year limitations period generally, applicable under Virginia law to actions of this nature.

As a threshold matter, the court of appeals was mistaken in characterizing this action as one "entirely referrable to injured feelings and humiliation." This description is not only a distortion of the purpose of the suit, but it demeans the fundamental constitutional rights that are at issue. By bringing this action, plaintiffs set out to vindicate for themselves and other Negroes basic federal rights that are guaranteed them by the Thirteenth Amendment as implemented by an Act of Congress. Plaintiffs asked for declaratory and equitable relief, as well as damages. Far more was at stake than merely their desire to obtain redress for "injured feelings and humiliation." In any event, even if that were an accurate characterization of their claims, the court of appeals nevertheless erred in deciding the limitations issue as it did, for, as shown below, the court's decision is not only based on a misinterpretation of the Virginia statute of limitations but, in addition, the decision squarely conflicts with an earlier ruling by the court of appeals interpreting the same statute in a non-civil rights case.

This actually is only the latest in what has become a significant number of cases where the Fourth Circuit, as well as the district courts in Virginia, have applied the wrong provision of that state's statute of limitations to suits brought under the Reconstruction statutes – Secs. 1981, 1982 and 1983 of Title 42, U.S.C.[17] In each of these cases the courts, following the precedent of *Almond v. Kent*, *supra*, have erroneously applied a two-year limitations period to actions which, under a proper interpretation of Virginia law, are governed by a five-year limitations period. In *Almond* the court of appeals correctly noted that where Congress enacts a statute authorizing a cause of action, but does not specify a limitations period, the "federal courts follow the limitations period fixed by the law of the state in which the district court is held." 459 F.2d at 203. Since Sec. 1981, on which the instant case is based, does not contain a limitations period and there is no other relevant federal statute of limitations, the appropriate period provided by state law is controlling. *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 701-704 (1966). Though *Almond* arose under Sec. 1983 of the Civil Rights Acts, while the instant case is a suit under Sec. 1981, the Fourth Circuit ruled in both instances that the 'actions were

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[17] See *Almond v. Kent*, *supra*, 459 F.2d at 203-204; *Allen v. Gifford*, *supra*, 462 F.2d 615; *Revere v. Tidewater Telephone Co.*, 6 FEP Cases 891, 892 (C.A. 4, 1973); *Sitwell v. Burnette*, 349 F. Supp. 83, 85-86 (W.D. Va., 1972); *Landman v. Brown*, 350 F. Supp. 303, 306 (E.D. Va., 1972); *Landman v. Royster*, 354 F. Supp. 1302, 1314 (E.D. Va., 1973); *Taliaferro v. State Council of Higher Education*, 372 F. Supp. 1378, 1383 (E.D. Va., 1974); *Cradle v. Superintendent, Correctional Field Unit #7*, 374 F. Supp. 435, 437, n. 3 (W.D. Va., 1973); *Wilkinson v. Hamel*, 381 F. Supp. 768, 769 (W.D. Va., 1974); *Edgerton v. Puckett*, 391 F. Supp. 463 (W.D. Va., 1975); *Van Horn v. Lukhardt*, 392 F. Supp. 384, 391 (E.D. Va., 1975).

for "personal injuries" and hence were governed by the two-year limitations period contained in Section 8-24 of the Virginia Code. Further, while it is true that in *Almond* the plaintiff alleged that he had been beaten by the police with resulting physical injuries, the court of appeals did not limit its decision to Sec. 1983 actions where there are physical injuries, but rather held that the two-year limitations period "applies generally to Sec. 1983 suits." 459 F.2d at 204.[18]

The first sentence of Section 8-24, which sets forth the two-year limitations period applicable to actions for "personal injuries," was added by an amendment to that section in 1954. Va. Acts 1954, ch. 589. Prior to that time, such suits were governed by the limitations periods now contained in the second sentence of the section which is applicable to "[e]very personal action, for which no limitation is otherwise prescribed." See *Herndon v. Wickham*, 108 Va. 824, 97 S.E.2d 5, 7-8 (1957). The 1954 amendment did not change this general catch-all provision. It continues to specify a five-year limitations period for a "personal action" which survives the death of a party, and a one-year period for one that does not.[19] The only effect of the 1954

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[18] It should be noted that the last sentence of Section 8-24 is an amendment adopted by the Virginia General Assembly subsequent to the *Almond* decision, which purports to shorten the limitations period for Sec. 1983 actions from two years to one year. Va. Acts 1973, ch. 385. The amendment has been ruled unconstitutionally discriminatory by two district courts, so the two-year rule mandated by *Almond* is still applied to Sec. 1983 actions. See *Edgerton v. Puckett*, *supra*, 391 F. Supp. 463 (W.D. Va. 1975); *Van Horn v. Luckhardt*, *supra*, 392 F. Supp. 384 (E.D. Va., 1975).

[19] The question of survivability of actions is discussed *infra*, pp. 28-31.

amendment was to prescribe a limitations period of two years for a single category of tort actions – those involving "personal injuries." Both the statutory history and the context in which the phrase "personal injuries" is used indicate that it must have reference to injuries of a physical or bodily nature. Indeed, this common-sense interpretation of the statute was followed by the Fourth Circuit in a non-civil rights case, *Griggs v. Farmer*, 430 F.2d 638 (1970), aff'g., 314 F. Supp. 1185 (E.D. Va., 1969), where the court held the first sentence of Section 8-24 with its two-year limitations period to be applicable to an action based on physical assault with resulting tortious bodily injury, whereas the catch-all provision in the second sentence was held to apply to a cause of action alleging breach of promise to marry with resulting mental anguish and humiliation. Decisions of the Supreme Court of Virginia similarly confirm the view that the two-year limitations period in Section 8-24 is meant to apply only to actions based on physical injury. See *Carva Food Corporation v. Dawley*, 202 Va. 543, 118 S.E.2d 664 (1961); *Travelers Insurance Company v. Turner*, 211 Va. 552, 178 S.E.2d 503 (1971); *Burton v. Terrell*, 368 F. Supp. 553, 557 (W.D. Va., 1973), and cases cited.

Since it is clear that the case at bar is not an action for "personal injuries" within the meaning of the first sentence of Section 8-24 of the Virginia Code, it becomes necessary to look to the second sentence of the section which applies to "[e]very personal action for which no limitation period is otherwise prescribed."[20] The sentence specifies

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[20] The only other limitations provision of the Virginia statutes which might arguably apply here is Section 8-13 which prescribes limitations periods for actions based on contract – five years in the case of a written contract. An action to obtain specific performance of a contract is governed by Section 8-13. *Chesapeake & Ohio Railway Co.*

(continued)

that an action falling within this category is subject to a five-year limitations period if it is "for a matter of such nature that in case a party die it can be brought by or against his representative." Whereas if it is "for a matter not of such nature" – in other words, if it is an action that does not survive the death of one of the parties, either the plaintiff or defendant – the prescribed limitations period is one year. In *Almond v. Kent* the court of appeals properly observed that in an action seeking redress for violation of constitutional rights the "right of recovery depends upon federal considerations, and is not one which is concerned with the archaic concepts of survivability of the common law." 459 F.2d at 204. Although the court's observation was correct, it followed it up with the wrong conclusion for, as we have seen, it proceeded to characterize such an action as one for "personal injuries," and thereby do violence to both the common-sense and judicial construction of that statutory term.

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[20] (continued) *v. Willis*, 200 Va. 299, 105 S.E.2d 833 (1958). Although the court of appeals in the instant case rejected plaintiffs' alternative contention that since these actions involve written contracts (A. 63-66, 70-72, 143, 148A), the five-year limitations period contained in Section 8-13 is applicable, there is respectable authority for the view that because it is "the right to 'make and enforce contracts' which is protected by Sec. 1981," the most analogous state limitation period is contained in statutory provisions applicable to contracts. *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 (C.A. 5, 1971); *Green v. McDonnell Aircraft Corporation*, 463 F.2d 337, 340 (C. A. 8, 1971), rev'd on other grounds, 411 U.S. 792; *Page v. Curtiss-Wright Corp.*, 332 F. Supp. 1060, 1064-1065 (D. N.J., 1971); *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass., 1972); *Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606-607 (E.D. Pa., 1974); and see *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 994, n. 28 (C.A.D.C., 1973).

The Supreme Court of Virginia follows the common law rule that in order to survive the death of one of the parties an action must be based on injury to real or personal property, or grow out of violation of contract rights, but actions for personal injury apart from property or contract, do not survive. *Carva Food Corporation v. Dawley, supra*, 202 Va. 543, 118 S.E.2d at 667. See also, *Herndon v. Wickham, supra*, 108 Va. 824, 97 S.E.2d at 7-11; *Sherley v. Lotz*, 200 Va. 173, 104 S.E.2d 795, 799 (1958). There are many reported decisions reflecting efforts by the Virginia Court to differentiate between actions that survive and those that do not, but no case sheds any light on whether actions such as those authorized by the Reconstruction Acts might survive. Since the instant action brought under Sec. 1981 is analogous to a suit based on non-performance of a contract, it is arguably survivable under common law principles and hence would be subject to the five-year limitations period in Section 8-24 of the Code.[21] No effort was made, however, by the courts below to apply the intricacies of common law survivorship doctrine to the instant case, since by virtue of the decision in *Almond v. Kent*, which requires application of the two-year limitations provision, a federal court in Virginia does not reach that issue.

Nevertheless, if Section 8-24 is properly interpreted and a federal civil rights action is viewed, as petitioners urge, as an action falling within the second sentence of Section 8-24, there is still no need for a federal court to grapple with the complex principles of common law survivorship. For this "archaic" doctrine, as the Fourth Circuit recognized in *Almond*, is not applicable to an action based upon "federal

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[21] See cases cited *supra*, pp. 26-27, n. 20.

considerations." 459 F.2d at 204. The Fourth Circuit's conclusion in this regard fully accords with the teachings of this Court, for it has repeatedly overruled efforts to limit the effectiveness of congressional enactments by application of the common law doctrine of survivorship. As the Court stated in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350-351 (1937), the common law rule abating an action on the death of one of the parties is one of the "archaisms of the law" and is "a policy which has now had its day." Accordingly, the Court in *Van Beeck*, as well as subsequent cases has sought to give a broad liberal effect to federal statutes by finding a way to effectuate their purposes notwithstanding any impediment created by the outmoded doctrine of non-survival. *Just v. Chambers*, 312 U.S. 383 (1941); *Cox v. Roth*, 348 U.S. 207 (1955); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Lower courts also, seeking to avoid the "extreme harshness" (*Cox v. Roth, supra*, 348 U.S. at 210) of the common law rule abating an action on the death of a party, have relied on this Court's decisions and enactments by Congress as evidence of a federal rule favoring survival where federal interests are at stake. See, *e.g.*, *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733 (C.A. 2, 1958); *Sands v. Abelli*, 290 F. Supp. 677, 681 (S.D. N.Y., 1968).

Because the Reconstruction statutes were enacted by Congress for the purpose of providing direct and expedient implementation of constitutional rights, the courts have shown particular concern last their effectiveness be diminished by survivorship rules. Thus, in *Brazier v. Cherry*, 293 F.2d 401 (C.A. 5, 1961), cert. denied, 368 U.S. 921, the court held that an action brought under 42 U.S.C. Sec. 1983 seeking damages for injuries sustained as a result of police misconduct could be maintained by the survivors of the victim

who died as a result of the injuries. Rejecting the contention that the action was not maintainable because of the common law rule of abatement, the Court stated that application of the rule "flies in the face of the express congressional purpose to provide for protection of citizens against unconstitutional deprivation of their fundamental civil rights." 293 F.2d at 406. *Pritchard v. Smith*, 289 F.2d 153 (C.A. 8, 1961) similarly was a suit brought under Sec. 1983 alleging misconduct by a police officer. Although the officer died after the proceeding was commcned, the court rejected the contention that this abated the action, concluding from a review of the decisions of this Court that there is "a strong trend to construe [federal] statutes liberally to allow the survival of tort actions." 289 F. 2d at 157. Accord: *Hall v. Wooton*, 506 F.2d 564 (C.A. 6, 1974).

The courts in the *Brazier*, *Pritchard* and *Hall* cases just described each discerned a federal doctrine of survivability, but since there was no relevant federal statute on the subject they turned to the survival statutes of the states where the causes arose to justify their decisions. In so doing, the courts relied for support on the language of 42 U.S.C. Sec. 1988 (*supra*, p. 3) which provides that in giving effect to the Reconstruction Acts if federal courts find that federal law fails to provide suitable remedies the courts are to utilize remedies provided by state law. Nevertheless, reliance by those courts on Section 1988 was recently criticized as being "unnecessary" and "inapt" by the Seventh Circuit which observed that the result reached in those cases "has firm basis in federal law and policy quite apart from Section 1988." *Baker v. F & F Investment Co.*, 420 F.2d 1191, 1196, n. 7 (1970). Likewise, another court, after an exhaustive review of the relevant authorities recently held that a Sec. 1983 action did not abate on the death of the defendant public official, even in the

absence of a state survival statute, because, the court concluded, there is "a federal common law of survival in civil rights cases in favor of the personal representative of the deceased." *Shaw v. Garrison*, 391 F. Supp. 1353, 1368 (E.D. La., 1975). As the Court stated, "such a holding seems required by the policies underlying the civil rights laws and the Supreme Court's treatment of survival actions in analogous contexts" *Ibid.*

For the reasons given, petitioners submit that Virginia's five-year period of limitations is applicable to the instant proceeding and that Mr. and Mrs. Gonzales' claims for compensatory damages should not have been deemed time-barred by the courts below.

CONCLUSION

For the foregoing reasons, plaintiffs submit that this proceeding should be remanded to the district court with instructions that the court award attorneys' fees to plaintiffs covering the total time that their attorneys have spent on the case and, in addition, that the Court award compensatory damages to Raymond Gonzales and Margaret R. Gonzales for the embarrassment, humiliation and mental anguish that they suffered as a result of defendants' discrimination against them.

Respectfully submitted,

ALLISON W. BROWN, JR.
Suite 301
~~1425~~ E Street, N.W.
Washington, D.C. 20004

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204

Attorneys for Petitioners

RODERIC V.O. BOGGS
Washington Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

Of Counsel

January 1976.

Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-306

MICHAEL C. McCRARY, etc., et al., and
COLIN M. GONZALES, etc., et al.,

Petitioners,

v.

RUSSELL L. RUNYON AND KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE SCHOOL, and
FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC.,

ANDREW A. LIPSCOMB
430 Washington Building
Washington, D.C. 20005

Attorney for Respondent
Fairfax-Brewster School, Inc.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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IN THE

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OCTOBER TERM, 1975

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BRIEF FOR THE RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC.,

QUESTIONS PRESENTED

1. Whether the mere fact that the district court believed the testimony of the plaintiffs and their witness, and not the testimony of the witnesses for the defendant, in an action under 42 U.S.C. Sec. 1981 instituted without warning more than three and one-half years after the discriminatory act complained of, the proof hinging upon uncorroborated telephone conversations, and in which there

was no finding or conclusion or any intimation by the district court of bad faith or perjury, is a sufficient basis for shifting plaintiffs' attorneys' fees to the defendant under the "bad faith" exception to the general American rule denying attorneys' fees to the prevailing party.

2. Whether Virginia's two-year statute of limitations which expressly applies to every action for personal injuries, or Virginia's five-year statute of limitations which expressly applies to every personal action for which no limitation is otherwise prescribed and which survives the death of the claimant, is the most nearly analogous Virginia statute of limitations applicable to a civil rights action brought under 42 U.S.C. §1981.

STATEMENT

The following facts are stated to supply omissions from the Statement of petitioners.

The petitioners, Raymond Gonzales, Margaret R. Gonzales, and their infant son, Colin M. Gonzales, are all native-born citizens of Trinidad. (A. 187) They came to this country in 1967 or 1968. (A. 176, 186, 187). The child was born on October 8, 1963. (A. 176) They returned to visit Trinidad in the summer of 1970. (A. 183) Mr. Gonzales is employed as a passenger service agent with United Air Lines. (A. 210) Mrs. Conzales is employed as a medical-steno clerk at the College of Medicine, Howard University. (A. 175) At the time of the application and at the rejection of the application the child was approximately five and one-half years of age. (A. 176)

The School does not advertise in newspapers, magazines, radio, or television. (A. 239) Most of the parents who send their children to the school learn about it from other parents. (A. 238) In May or June of 1968, a year

before the application involved here, Mrs. Gonzales made a telephone call to Fairfax-Brewster concerning the school's admission requirements, and it was sent to her then. (A. 195) They knew about the Summer Camp from a friend whose son had attended it. (A. 176) She knew from the School's Brochure that a child had to have kindergarten training to get into the first grade. (A. 197) And both Mr. and Mrs. Gonzales knew that the School required the submission of reports and records from previous schools attended, but they did not comply with these requirements when they applied for Colin. (A. 198, Tr. 101-102) The Day Nursery which Colin was attending when the application was made did not have a kindergarten program. (Tr. 281-282) No child coming from that Day Nursery had ever been admitted to a grade at the Fairfax-Brewster School. (Tr. 251-282) They only applied for admission to a particular program in the Summer Camp, but it was their plan to have the child continue in the First Grade in the fall. (A. 179, 185)

The educational objectives and practices of the School are geared to high standards of excellence, and it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity. (A. 75-86, 90-91) To qualify for admission to the First Grade, the application must show previous training, report card, evaluation, record of reading readiness and numbers testing. (A. 251) A child is admitted to the School only if he is of average intelligence and has an achievement potential in keeping with the class he seeks to enter, and he must be emotionally, socially, and physically acceptable. An applicant will not be admitted unless the Admittance Committee is satisfied that his presence in the School will be in the best interests

of himself, his classmates, and the School in general. (A. 86) The School's high standards rule out acceptance of a child in the first grade who has not had prior kindergarten training including reading and numbers. A day nursery is not the same as a kindergarten, and a child with only day nursery training would not be accepted in the First Grade. No child with only day nursery training has ever been accepted in the First Grade in the School. (A. 241-244) The enrollment contract provides that the School reserves the right to accept or deny the application of any child for any reason whatever. (A. 66)

No Negroes had ever applied prior to the application of the petitioners. (A. 244) White applicants are and have been denied admission if not qualified. (A. 244-245) Many non-Caucasians have been accepted at the school. (A. 88-89)

Mrs. Gonzales testified that she had not personally encountered or had any particular exposure to racial discrimination in Trinidad. (A. 187) Mr. Gonzales testified that he grew up in Trinidad, and that there was no racial discrimination problem at all in Trinidad. (Tr. 96) The child was rejected by Bobbe's School about a week after his rejection by Fairfax-Brewster School, and was accepted immediately at another private school in the area, which he attended for the next two years. (A. 182-183)

A notice was sent to Mr. and Mrs. Gonzales, dated May 16, 1969, stating:

> The school is, at this time, unable to accommodate the application of Colin A. Gonzales for Safari Summer Day Camp. Your check submitted with form is hereby returned. Also enclosed is the medical form which you

> so kindly had completed in advance. (P's Exh. ____, marked 2, A. 176, 73)

Mr. Gonzales testified that when the rejection notice was received he telephoned the School and was told by a Colonel or Captain Reiss that the application had been rejected because the school was not integrated. (A. 210) There was no corroboration of this telephone conversation. Captain Steuart A. Reiss denied that he had had any such telephone conversation (A. 169-170) as did Robert S. Riess. (Tr. 307) Mr. and Mrs. Gonzales testified that they told the child, then five and one-half years of age, that he had been rejected by Fairfax-Brewster School because he was black. (A. 186, 213) A Mrs. Bryant was the plaintiffs' only witness other than Mr. and Mrs. Gonzales. She testified that she telephoned the School in January, 1972, inquired as to whether the School admitted Negro children, and was told that it did not. (A. 222-223) She was not sure whether she talked to a man or a woman. (A. 223) On cross-examination she testified that she first found out about the suit when she read about it in the paper "a few months ago," that that was the first that she ever saw or knew about the suit; and that when she read about it in the paper she decided she wanted to come forward as a witness. (Tr. 148-149) When asked on cross-examination how many people she had talked to about her telephone conversation, she said that she had talked to her husband and "maybe a few neighbors." (Tr. 148-149) After further examination she testified that she had talked to Mrs. McCrary (one of the petitioners claiming against Bobbe's School), and that she did not talk to anyone else about it after that. (Tr. 150-151) When she was then asked, "Did Mrs. McCrary tell you to come here today?", counsel for the petitioners interjected, as follows:

"Mr. Brown: Your Honor, we will stipulate that Mrs. Bryant was a neighbor of the McCrarys and the Gonzaleses. They lived in the same general area; and, as a matter of fact, I had talked to Mrs. Bryant at one time about being a plaintiff in the law suit, and she didn't want to be one. So, she knew about this whole thing last summer when we were putting the lawsuit together." (Tr. 151)

SUMMARY OF ARGUMENT

I

The mere fact that the trier of the facts does not believe the testimony of the defendant's witnesses is not a sufficient basis for shifting plaintiffs' attorneys' fees to the defendant, in the absence of a finding of bad faith or perjury. There was no such finding here, and in fact the district court refused to award punitive damages.

Under the American rule attorneys' fees are not ordinarily awarded to the prevailing party in the absence of specific statutory authorization or contractual obligation. However, there are certain recognized and time-honored exceptions to the rule. That the plaintiffs' version of the facts was accepted by the district court, and not the defendant's version, does not bring the case within the "bad faith" or any other exception to the American rule. This Court only last year, in *Alyeska Pipeline Service Company v. The Wilderness Society*, decided that new exceptions cannot be made to the American rule by the courts but only by action of Congress, and stated that 28 U.S.C. Sec. 1923 is binding upon the Federal courts in prohibiting the awarding of attorneys' fees in excess of those provided in

that statute in any case brought under a Federal statute which does not expressly authorize the awarding of attorneys' fees.

42 U.S.C. Sec. 1988 does not undercut the *Alyeska* holding with respect to actions brought under code sections derived from the Civil Rights Act of 1866, such as 42 U.S.C. Sec. 1981. Under the common law of Virginia attorneys' fees would not be awarded under such circumstances. Moreover, Sec. 1988 cannot be so read because then it would be inconsistent with 28 U.S.C. Sec. 1923.

None of the cases cited by petitioners is in point. There is no precedent for the ruling they seek, which, although they seek it in the name of equity, would under the facts of this case be an inequitable result.

II.

Under the principle established in *O'Sullivan v. Felix* and reaffirmed in 1975 in *Johnson v. Railway Express Agency* specifically with respect to 42 U.S.C. Sec. 1981, if there is no specifically stated or otherwise relevant statute of limitations for a cause of action under a Federal civil rights act, the controlling period would ordinarily be the most appropriate one provided by state law. In *Johnson* the apppropriate period provided in the Tennessee statute was one year. The court below in the case at bar, sitting *en banc*, held unanimously that Virginia's two-year statute governing actions for personal injuries applied to petitioners' actions against respondents under Sec. 1981, following its earlier decisions in *Almond v. Kent*, involving a claim under Sec. 1983, and *Allen v. Gifford*, involving a claim under Sec. 1982.

In *Almond* the court pointed out that in the broad sense every action under Sec. 1983 results from "personal injuries", and that since Virginia's two-year period of limitation applies to "every action for personal injuries" it properly applies to Sec. 1983 suits.

Cases cited by petitioners to show that the term "personal injuries" as used in the statute applies only to "physical injuries", fail to do so. Petitioners' contention that the two-year statute is not applicable, being squarely opposed to the well-reasoned and well-settled construction of the statute in numerous cases at the district court and appellate court levels, and being unsupported by any precedents, must fall. Their contention that the five-year statute applicable to personal actions which survive and for which no other limitation is otherwise prescribed is the appropriate period, must therefore fall too.

The five-year period prescribed in Sec. 8-13 of the Virginia Code for written contracts which are signed by the party to be charged thereby, clearly cannot apply because no written contract was made and none signed by this respondent. If the contract analogy is proper, and we say that it is not, the claims of Mr. and Mrs. Gonzales would be barred by the three-year period prescribed in Sec 8-13 for express or implied contracts not in writing.

All but one of the cases cited by petitioners in support of the contract analogy involved an existing employment contract or collective bargaining agreement.

Each case has to be decided with reference to the peculiar statutes of limitation of the state in which the action is brought, and in the light of how the statutes have been interpreted and applied in the state, whether by state or Federal courts. The Virginia statutes have been

interpreted to make the period prescribed for actions for personal injuries the appropriate period for a Federal civil rights action. Petitioners' argument on "survivability" is only reached if that interpretation is overturned and the express language of the statutes is disregarded. But even in that case the one-year limitation for personal actions that do not survive, rather than the five-year limitation for personal actions that do survive, would apply. It is the State intention and policy as to limitations of actions and the State definition of survivability that would determine the appropriate limitation period.

ARGUMENT

I.

THE FACTS DO NOT BRING THIS CASE WITHIN ANY OF THE EXCEPTIONS TO THE AMERICAN RULE WHICH GENERALLY DENIES ATTORNEYS' FEES TO THE PREVAILING PARTY, OR WARRANT AN EXTENSION OF THE "BAD FAITH" EXCEPTION.

We submit that the short and correct answer to petitioners' claim for attorneys' fees is that *Alyeska Pipeline Service Company v. The Wilderness Society*, 44 L.Ed.2d 141 (1975) is dispositive of the point. In presenting their argument petitioners appear to have drawn heavily upon the dissents of Mr. Justice Brennan and Mr. Justice Marshall in *Alyeska*, to which they have added an argument with respect to 42 U.S.C. Sec. 1988. It should suffice to answer that argument to point out that under the common law of Virginia, as modified by its constitution and statutes, attorneys' fees are not awarded to the prevailing party merely because the witnesses for the losing party are not believed by the trier or triers of the facts, nor have petitioners cited any Virginia cases to support their novel

and plainly inequitable contention, there being none. Nor is there any Virginia case holding that a party whose witnesses are not believed by the trier or triers of the facts is guilty of bad faith.[1] The Court of Appeals said as to this point:

> "We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying 'obstinate obduracy.' Brewer v. School Board of City of Norfolk, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of 'obstinate obduracy', and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in Brewer. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception of memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation." (A. 18-19)

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[1] Also, under *Alyeska*, petitioners' argument with respect to Sec. 1988 must fall. Any remedy, such as the allowance of attorneys' fees, to be available under Sec. 1988 must be consistent with the laws of the United States. As clearly shown in *Alyeska*, the allowance of attorneys' fees, except pursuant to express authorization in a specific statute, or under one of the long-recognized exceptions to the general American rule, would be inconsistent with the fee statutes Congress has enacted, and particularly with 28 U.S.C. Sec. 1923. *Alyeska Pipeline Service Company v. The Wilderness Society*, *supra*, at 159.

In a footnote the Court pointed out that the district court, in refusing punitive damages, 'found that the defendants had not" acted recklessly or wilfully in disregard of clear existing law.' 363 F. Supp. at 1205 n. 5." The Court of Appeals discussed some of the statutes authorizing the award of attorneys' fees, and leading decisions under those statutes; the private attorney general theory (later to be repudiated in *Alyeska*); the significance of the failure of Congress to expressly provide in a statute for the award of attorneys' fees to the prevailing party in actions brought under it; and concluded by saying:

> "Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees, for we find none of the recognized exceptions applicable." (A. 21-22)

The three members of the Court of Appeals who dissented on the question of applicability of Sec. 1981 to the defendant private schools, commented as follows with respect to the district court's findings of fact:

> "We are not convinced that the district court's findings are not clearly erroneous. Such laments, however, being largely unavailing, see United States v. Johnston, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented." (n. 1, A. 25)

Thus it may be said that three of the seven judges who sat on the Court of Appeals were of the opinion that the trial court erred in finding the testimony of the plaintiffs and their witnesses believable and the testimony of defendants' witnesses unbelievable.

The Court said in *Alyeska*:

> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult indeed for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. . . And if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigations in Sec. 1983 actions seeking to vindicate constitutional rights?" 42 L.Ed.2d at 157.

At page 159 the Court said:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to the general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. Sec. 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. . ."

The recognized exceptions to the general rule, including the exception when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, were reaffirmed by the Court in *Alyeska*. But it is clear

that *Alyeska* means that those exceptions are not to be added to, whether by adding a new one or by expanding a recognized one on a novel and inherently inequitable basis. As the Court said in concluding its opinion:

> ". . . But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by the respondents and followed by the Court of Appeals." Id at 161.

The cases cited by petitioners all fall within the recognized exceptions and do not remotely resemble the case at bar. For example, *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), involved a judgment obtained by fraud and *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745 (C.A. 7, 1974), involved an action under a statute expressly providing for attorneys' fees. In *First National Bank in Sioux Falls v. Dunham*, 471 F.2d. 712 (C.A. 8, 1973), attorneys' fees were awarded Rule 54(d) of the Federal Rules of Civil Procedure. The circumstances bringing the case within the exception when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, are set forth in the opinion of the Court of Appeals, at page 713:

> "Judge Lord states in his opinion that the award of attorneys' fees was made for 'dominating reasons of justice' and because L. T. Dunham's conduct made it necessary for the plaintiff to litigate with third parties in order to enforce his judgment. The record reveals that L. T. Dunham has attempted to conceal assets, that he has made fraudulent convey-

> ances subsequent to the instigation of litigation in South Dakota, and that he engaged in extensive evasive and dilatory tactics that tended to delay and hinder the trial court. In addition, the record reveals that Thomas Dunham gave misleading testimony at the urging of L. T. Dunham, that L. T. Dunham attempted to bribe a handwriting expert and that certain records were falsified for trial. On the basis of this record, we find no abuse of discretion on the part of Judge Lord in awarding the attorneys' fees."

In *Thonen v. Jenkins*, 517 F.2d 3, 6 (C.A. 4, 1975), the district court made findings of fact which "amply support its conclusion that defendants' actions throughout the case were 'unreasonable and obdurate and obstinate', bringing the case within "the 'obdurate obstinancy' exception to the general 'American Rule' that attorney's fees are not taxed against a losing party absent a statutory provision or contractual obligation for them. . ." In *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (C.A. 5, 1971), the district court found that certain assertions by Kinnear-Weed were made fraudulently, and awarded to Humble its costs, including attorneys' fees and expert witness fees, which arose out of the fraudulent assertions.

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) and *Hall v. Cole*, 412 U.S. 1 (1973) involved the exception that a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself may be allowed to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973)

and *Vaughan v. Atkinson*, 369 U.S. 527 (1962) involved the exception when dilatory tactics have been employed by the losing party. In *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (C.A. 4, 1951), the court of appeals said that the justification for awarding counsel fees to the prevailing plaintiffs was that they were of small means, were members of a union which was required as bargaining agent to represent their interests as well as the interest of other members, that they had been subjected to discriminatory and oppressive conduct by the union, and that in three previous cases the same union had been before the United States Supreme Court because of its persistent discrimination against Negro members, although it has been clothed with the authority to act as bargaining representative for all of its members by the Railway Labor Act.

Petitioners argue that the fact that racial discrimination is involved in the case at bar is a factor warranting consideration by a court of equity on the question of attorneys' fees. Under *Alyeska* the argument is clearly erroneous. Racial discrimination is not "oppressive", within the meaning of the exception to the general American rule respecting the award of attorneys' fees to the prevailing party. But petitioners seize upon the fact that the conduct of the union in *Rolax* was both oppressive and discriminatory as making the two things identical for purposes of awarding attorneys' fees. This is not only specious reasoning on its face; it is clearly erroneous under *Alyeska*.

Petitioners assert that there is no longer any doubt of the "oppressive" effect that racial discrimination has upon those discriminated against, citing Proshansky and Newton, Katz, Wilcox, and Coles. The contrary is true. There is considerable doubt on the subject. In fact, there is a great

deal of respectable authority to the effect that integration of black and white children in schools is detrimental, not beneficial, to the black children, and that it increases rather than reduces unfavorable judgments and hostility between the races. See the numerous studies discussed and cited in Leech, *Note on Busing as a Judicial Remedy: A Socio-legal Reappraisal,* 6 Ind. Law Rev. 710 (1973). See also the testimony of Dr. Arthur R. Jensen, Professor of Educational Psychology, University of California at Berkeley, and Dr. Ernest van den Haag, Professor of Social Philosophy, New York University, Hearings on Emergency School Aid Act of 1970 (H.R. 17846), June 29, 1970, before the General Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2nd Sess., at 334 and 343, respectively.

There is good reason to doubt that there was any psychological injury at all to the petitioners as the result of the rejection of the application to attend summer day camp. The application was rejected on May 16, 1969, and about two weeks after that the child was admitted at the summer camp of another private school where he remained for the next two years. The child was only five and one-half years of age at the time. According to the testimony of the parents, *they* told him he was rejected because he was black. The testimony of Mr. and Mrs. Gonzales that they had no previous experience with discrimination in Trinidad—where Mr. Gonzales said there was no problem of racial discrimination at all—of which they and the child are native-born citizens, from which they came to this country about 1967 or 1968, and to which they returned for a visit in the summer of 1970, is at variance with what has become common knowledge —that there are serious racial troubles in Trinidad—and numerous authorities so attest:

The population of Trinidad is about 47 percent of African descent, with the balance composed of East Indians, 35 percent; Europeans 3 percent; Chinese, 1 percent; and mixed (colored), 14 percent. By the end of the 1960's unemployment was approaching a level of 20 percent, due in part to rapid population growth, and black militants were agitating against the supremacy of a small white minority in industry, and of East Indians and other ethnic groups in trade. In April, 1970, riots occurred in Port of Spain, and there was a short-lived revolt by elements of the nation's 800-man army. (From *The Encyclopedia Americana,* International Edition, 1973, Vol. 27, pp. 114-115)

Asian Indians form 36 percent of the total population; West Indian Negroes form 46 percent; 15 percent are mixed in origin; 2.5 percent are of British, French, Spanish, and Portugese stock, and there are a few Syrians and Chinese. The government's inability to improve the economy, living conditions and wages, and increasing unemployment led to unrest among black militants, and a state of emergency was declared in Trinidad on April 21, 1970. Members of the opposition Democratic Labour Party, Indians employed mainly in the sugar industry, Negroes employed mainly in the oil industry, and the general population of Port-of-Spain joined common cause and rioted in protest. A faction of the 850-strong Trinidad Army mutinied, and U.K. and U.S. ships were sent to stand by to help if needed. (from *The Encyclopedia Brittanica,* 1971 edition, Vol. 22, pp. 238-239)

> In 1962 Trinidad became an independent state within the commonwealth, and in 1967 became a member of the Organization of American States. "Black Power" riots in April, 1970 and a mutiny in the army which lasted six months resulted in the declaration of a state of emergency. Subsequent unrest has culminated in guerilla warfare. (from *The Europa Year Book, 1975, A World Survey*, Vol. II, p. 1554)

Petitioners refer to the School's advertisement in the yellow pages of the telephone directory, and to a flyer received by Mrs. Gonzales in response to which she sought to get the child into the summer camp. They imply, but do not argue, that somehow this makes the School a public accommodation. Originally they had claimed under 42 U.S.C. Sec. 2000a, as well as under Sec. 1981, but dropped the Sec. 2000a claim before trial, and it is not properly a point here. In any case, the contention that a private school is a public accommodation because it places its card in the yellow pages of the telephone directory is wholly without merit. Many parents would neither know the names or the locations of private schools if it were not for the yellow pages. To carry such an advertisement is an aid to them. Information sent to them upon request will quickly inform them of the high standards for admission and continuance as a student in the School. It was established by uncontradicted testimony that the School does not advertise in newspapers, magazines, radio or television (A. 239) and that most of the parents who send their children to the School learn about it from other parents (A. 238). The test as to whether a private establishment is truly private is that it is not open to all of the white members of the public who can pay the price of admission. *Tillman v. Wheaton-Haven*

Recreation Association, 410 U.S. 431 (1973). Clearly, that is [redacted] true of Fairfax-Brewster School. As to the peitioners, they had received material from the School a year before, and therefore knew all about its strict requirements. With respect to the flyer in connection with the Summer Day Camp, it is a widespread and customary practice of Summer Day Camps to send out such flyers in advance of the vacation season, and this is a fact of common knowledge.

In conclusion on this point, it is submitted that under the facts of this case it would be inequitable to award attorneys' fees to the plaintiffs even if the law allowed it.

II

THE COURT OF APPEALS CORRECTLY DECIDED THAT VIRGINIA'S TWO-YEAR STATUTE OF LIMITATIONS, WHICH EXPRESSLY APPLIES TO "EVERY ACTION FOR PERSONAL INJURIES," IS APPLICABLE TO A CIVIL RIGHTS ACTION BROUGHT IN VIRGINIA UNDER 42 U.S.C. Sec. 1981

In *O'Sullivan v. Felix*, 233 U.S. 318 (1914) this Court held that where Congress has not enacted a statute of limitations applicable to suits arising under a particular Federal civil rights statute, Federal courts will apply the most nearly analogous statute of limitations of the State in which the action is brought. In *O'Sullivan* the Court held that a one-year Louisiana statute applicable to actions for civil damages, and not a five-year limitation prescribed by a Federal statute governing suits for penalties, applied to an action for violation of the Civil Rights Act of 1871. *O'Sullivan* has been followed repeatedly by this Court. In *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966), involving a labor union's claims on behalf of its

members under the Labor Management Relations Act, which contained no statute of limitations, the question was whether a six-year Indiana statute of limitations governing claims on oral contracts, or a twenty-year Indiana statute of limitations governing claims on written contracts, was the more appropriate. The Union contended that the twenty-year limitation was more appropriate because the action was based upon a written collective bargaining agreement. The Court held, however, that the six-year statute was more appropriate, the action being based partly on oral contracts and partly on a written contract. The suit having been filed more than six years after the cause of action arose, it was held to be time-barred. The *O'Sullivan* rule was reaffirmed in *Cope v. Anderson*, 331 U.S. 461 (1947), involving the National Bank Act; *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906), involving the Sherman Act; *Campbell v. Haverhill*, 155 U.S. 610 (1895), involving the Patent Act; and, most recently, in *Johnson v. Railway Express Agency*, 44 L.Ed. 2d 295 (1975), involving 42 U.S.C. Sec. 1981. In *Johnson* the Court held that a one-year Tennessee statute of limitations was the appropriate statute, and that the suit was therefore time-barred.

In holding unanimously that Virginia's two-year statute governing actions for personal injuries applies to petitioners' actions under 42 U.S.C. Sec. 1981, against the respondents, Fairfax-Brewster School and Bobbe's School, the Court of Appeals followed earlier decisions in *Almond v. Kent*, 459 F.2d 200 (C.A. 4, 1972), involving a claim under 42 U.S.C. Sec. 1983, and *Allen v. Gifford*, 462 F.2d 615 (C.A. 4, 1972), cert. denied *sub. nom.*, *Gifford v. Allen*, 409 U.S. 876 (1972), involving a claim under 42 U.S.C. Sec. 1982. In *Almond* the district court for the eastern district of Virginia had ruled that the one-year limitation

prescribed in Section 8-24 of the Virginia Code for "every personal action for which no limitation is otherwise prescribed" and which does not survive death, applied to an action under 42 U.S.C. Sec. 1983, and therefore held the suit to be time-barred. 321 F. Supp. 1225. In a well-reasoned decision the Court of Appeals reversed, holding that the two-year limitation prescribed in the same statute for "every action for personal injuries", was the appropriate limitation for a civil rights action brought under a Federal statute which did not prescribe its own period of limitation. The court said, in part:

> ". . . In essence, Sec. 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under Sec. 1983 which is well-founded results from 'personal injuries.' Under Virginia law, it is the object of litigation which determines the applicability of a statute of limitations not the form in which suit is instituted. Birmingham v. Chesapeake & Ohio Railway Co., 98 Va. 548, 37 S.E. 17 (1900); Friedman v. Peoples Service Drug Stores, 208 Va. 700, 160 S.E. 2d 563 (1968). See also Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E. 2d 257 (1969). Hence, our conclusion that the Virginia two-year period of limitations, applying to '*every* action for personal injuries' (emphasis added), applies generally to Sec. 1983 suits.
>
> "Even if we conclude that a sec. 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation, it is 'more serious

> than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a constitutional right.' Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 488 (1961) (Harlan, J., concurring). Accordingly, we think that it more properly belongs at the two-year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period. See Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E. 2d 177 (1946)." 459 F.2d at 204.

In *Allen* the Court of Appeals reversed a holding by the district court for the eastern district of Virginia that the one-year limitation applied to a complaint charging racial discrimination in the sale of real estate in violation of 42 U.S.C. Sec. 1982. The plaintiffs in *Allen* sought compensatory and punitive damages and alleged that they had suffered humiliation, emotional stress and anxiety. In holding that the two-year limitation period applied the Court of Appeals cited its decision in *Almond* and said that

> ". . . both Sec. 1982 and Sec. 1983 were enacted to redress the infringement of civil rights. Both allow the recovery of damages for personal wrongs. We conclude, therefore, that the reasons stated in Almond for applying Virginia's two-year statute of limitations to actions under sec. 1983 make the same limitation period appropriate for personal injury suits based on sec. 1982." 462 F.2d at 615.

Petitioners' contention that the unanimous decision of the Court of Appeals on the statute of limitations question

> "squarely conflicts with an earlier ruling by the court of appeals interpreting the same statute in a non-civil rights case" (Pet. Br. at 23)

will not bear scrutiny.

The non-civil rights case referred to is *Griggs v. Farmer*, 430 F.2d 638 (1970) aff'g 314 F. Supp. 1185 (E.D. Va., 1969). The plaintiff had filed a suit in a State court for breach of promise only, and in the district court for breach of promise and for physical assault. The state court suit was removed to the district court. The plaintiff conceded that the one-year limitation provided in Sec. 8-24 of the Virginia Code for "personal actions" which do not survive was applicable to the claim for breach of promise, and that the two-year limitation provided in Sec. 8-24 for actions for "personal injuries" was applicable to the claim for physical assault. There was no dispute between the parties as to the applicable limitation periods. Each suit was filed after the period applicable to the claim or claims it contained had expired. The sole questions before the district court were whether the expired time limit for the breach of promise suit had been extended by later claims of special damages, which may in some circumstances have that effect under Virginia law, and whether the assault claim could, by virtue of F.R.Civ.P. 15(c), be revived by an amendment retroactive to the date of the commencement of the breach of promise action. As to the first question, the district court said that there was no proof adduced or authority noted establishing that the claimed damages constituted special damages, and accordingly dismissed the suit for lack of timeliness. As to the

second question, the district court ruled that the requested amendment could not relate back to the breach of promise action since it was an "entirely new claim.", and accordingly dismissed that suit also as untimely. In a half-page *per curiam* opinion the Court of Appeals affirmed the district court's rulings on both questions.

Petitioners cite *Carva Food Corporation v. Dawley*, 202 Va. 543, 118 S.E.2d 664 (9161), *Travelers Insurance Company v. Turner*, 211 Va. 552, 178 S.E.2d 503 (1971), and *Burton v. Terrell*, 368 F. Supp. 553, 557 (W.D.Va., 1973), as holding that the two-year limitation period in Section 8-24 is meant to apply only to actions based on physical injury. Yet upon examination of these cases it is discovered that *Carva and Travelers* each involved a claim for consequential damages to personal property and each held that the claim involved was governed by the one-year limitation applicable to personal actions which do not survive and for which no limitation is otherwise prescribed. Had they been claims for direct injury to property they would survive and therefore would be governed by the five-year limitation applicable to personal actions of that character. In *Burton*, which involved an action for fraud in procuring a deed of real property, the court held that the five-year limitation applies to such an action.

None of *Carva, Travelers and Burton* involved personal injuries, and none said or decided that the two-year limitation period prescribed in Sec. 8-24 for actions for personal injuries was limited in its application to those personal injuries which are purely physical in nature, nor has any case been cited by petitioners to that effect.

In a footnote (n. 20, p. 26), petitioners point to Section 8-13 of the Virginia Code[2] as containing another limitation period which might be applicable to petitioners' claims under Sec. 1981. They mention the five-year limitation period prescribed for claims founded upon written contracts signed by the party to be charged thereby, but fail to mention the three-year period prescribed for claims founded upon unwritten contracts. Petioners argue that because Sec. 1981 relates to the making and enforcement of contracts, and because their claims are based on refusals to make contracts, therefore the appropriate limitation period in Sec. 8-13 would apply to their claims.[3] We believe that the Court of Appeals correctly held that the two-year limitation period applicable to "every action for personal injuries" is the appropriate statute for actions brought under Sec. 1981, the deprivation of a constitutional right being a personal injury.

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[2] Section 8-13 of the Virginia Code, 1950, provides in pertinent part:

8-13. Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;

If it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and

If it be upon any other contract express or implied within three years . . .

[3] It is noted that Petitioners failed to state in the Petition for Writ of Certiorari any claim that Sec. 8-13 applies to their suits against respondents.

However, if the Court should take a different view and hold that Sec. 8-13 is more appropriate, then the claims of the adult Gonzaleses against this respondent would still be time-barred under the three-year limitation applicable to nonwritten contracts, because there was no written contract signed by Fairfax-Brewster School, and the suit was filed more than three and one-half years after the cause of action arose.

Six cases are cited by petitioners to support their contention that because it is the right to make and enforce contracts that is protected by Sec. 1981, the most analogous state limitation period is contained in statutory provisions applicable to contracts: *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (C.A. 5, 1971), rev'd on other grounds, 411 U.S. 792; *Green v. McDonnell Aircraft Corporation*, 463 F.2d 337 (C.A. 8, 1971), rev'd on other grounds, 411 U.S. 792; *Page v. Curtiss-Wright Corp.*, 332 F. Supp. 1060 (D.N.J., 1971); *Macklin v. Spector Freight System, Inc.*, 478 F.2d 979, 994, n. 28 (C.A.D.C., 1973); *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D.Pa., 1974); and *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass., 1972). In all except the last of the cited cases an existing employment contract or collective bargaining agreement was involved. Only in *Sims* was the nonexistent contract which the defendant refused to make with the plaintiff the *only* contract involved. In *Sims*, which involved claims under Sec. 1981 and Sec. 1982, the district court pointed out that Massachusetts has no general statute of limitations, specific statutes having been provided for specific claims, and that neither the statute fixing a two-year limitation period for torts (which the defendants argued was the more appropriate), nor the statute fixing a six-year limitation period for contracts

(which the plaintiffs argued was more appropriate) was precisely applicable. However, the court noted that in *Boudreaux, supra,* and *Page, supra,* the courts had applied the limitation period applicable to contract actions, and that in *Boudreaux* Judge Wilkey had remarked, "It is after all, the right to 'make and enforce contracts' which is protected by sec. 1981." Moreover, the contract which defendant refused to make with plaintiffs in *Sims* was an insurance contract, and the court said that insurance contracts embody property rights for purposes of 42 U.S.C. Sec. 1982. The court in *Sims* concluded that under the circumstances of the case the contract analogy was the most apt.

There are multitudinous variations among the statutes of limitations of the various states. They have different categories and different limitation periods. It is doubtful that any two are alike. The statute which may be applied in one state as the most nearly analogous may be entirely different from the statute applied in another state. Each case has to be decided with reference to the peculiar statutes of limitation of the state in which the action was brought, and in the light of how the statutes have been interpreted and applied in the state, whether by state or Federal courts. In Virginia the two-year limitation period prescribed for actions for personal injuries has been consistently applied to civil rights actions brought under Federal statutes which do not prescribe their own limitation period. The rationale for this choice of statute has been fully explicated by the Court of Appeals in *Almond,* and is both sound and in accord with state policy. Other categories of actions, with shorter or longer periods of limitation, have been applied in other states. Cases [illegible] the contracts analogy have been discussed above. Typical cases in which, as with Virginia, a different

category was felt to be more analogous, are: *Baker v. F & F Investment Co.*, 420 F.2d 1191 (C.A. 7, 1970) (Sec. 1982 action: the five-year statute of limitations of Illinois governing civil actions not otherwise provided for applied rather than the forty-year statute governing actions regarding real estate or the ten-year statute governing actions on written contracts); *Waters v. Wisconsin Steel Wks of International Harvester Co.*, 427 F.2d 476 (C.A. 7, 1970) (Sec. 1981 action: the five-year statute of Illinois governing civil actions not otherwise provided for applies); *Crosswhite v. Brown*, 424 F.2d 495 (C.A. 10, 1970) (action under Sections 1983 and 1985: the two-year statute of Oklahoma governing an "action for injury to the rights of another, not arising on contract, and not hereinafter enumerated . . ."applied); *Swan v. Board of Higher Education of City of New York*, 319 F.2d 56 (C.A. 2, 1963) (Sec. 1983 action: the six-year New York statute of limitations prescribed for actions "to recover upon a liability created by statute" applied); *Buckner v. Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N.D.Ala., 1972) (action under Sections 1981, 1988 and 2000e: the one-year Alabama statute of limitations governing "any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated", applied to the Section 1981 claim).

Although petitioners say that both the statutory history and the text in which the phrase "personal injuries" is used indicate that it must have reference to injuries of a physical or bodily nature, and that therefore it is "clear" that the case at bar is not an action for personal injuries within the meaning of the first sentence of Section 8-24 of the Virginia Code, they have failed to produce such statutory history, or a sound argument as to the text, or any cases actually supporting their con-

tention. The question of "survivability" is never reached. Their argument that this Court should hold that the five-year limitation period applies to a Sec. 1981 action amounts to a request that the Court disregard the express language of Sec. 8-24 of the Virginia Code, overrule a well-reasoned construction of the statute by the Court of Appeals in *Amond v. Kent, supra,* which has been followed in numerous cases at the district court and appellate court levels and has become the settled doctrine in Virginia, and to upset a statutory scheme and traditional scale of values with respect to the various categories of actions–a scheme and scale of values which take into account the Virginia experience and policy for protecting defendants from stale and possibly fraudulent claims which have been allowed to slumber until witnesses have moved, died or otherwise become unavailable, memories have dimmed, and documentary evidence has been lost or discarded as worthless. Fairfax-Brewster School had no inkling that petitioners intended to make any claim or file any suit against it until more than three and one-half years after the application was rejected, when the suit was filed; it had not retained the records with respect to the application and its rejection; and the claim depended in large part upon two uncorroborated and unverifiable telephone conversations.

Statutes of limitation, as stated in *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946):

> "are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared."

And as this Court said in *Burnet v. New York Central R. Co.*, 380 U.S. 424, 428 (1965):

> "Statutes of limitation are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349, 64 S.Ct. 582, 586, 88 L.Ed. 788. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."

As previously noted, the survivability question is only reached if a well-reasoned and well-settled construction of the statutes of limitation of Virginia is overturned and the express language of the statutes disregarded. But even in that case the five-year limitation sought by petitioners would not be the appropriate limitation period to be applied to a Section 1981 action. Instead, the one-year limitation period would apply. For if such an action does not survive under state law, but does survive under Federal law, still it is the State intention and policy as to limitations of actions, and the State definition of survivability that determine the appropriate limitation period.

CONCLUSION

For the foregoing reaons, that part of the judgment of the Court of Appeals which affirms the judgment of the district court on the issue of the statute of limitations should be affirmed, and that part of the judgment of the Court of Appeals which reverses the judgment of the district court awarding attorneys' fees to the petitioners should be affirmed.

Respectfully submitted,

ANDREW A. LIPSCOMB
430 Washington Building
Washington, D. C. 20005

Attorney for Respondent
Fairfax-Brewster School, Inc.

Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

No. 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL C. McCRARY, ETC., ET AL.,

AND

COLIN M. GONZALES, ETC., ET AL.,

Petitioners,

V.

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AND

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR RUSSELL L. RUNYON, ETC., d/b/a BOBBE'S PRIVATE SCHOOL

LOUIS KOUTOULAKOS
2054 North 14th Street
Arlington, Virginia 22201
Attorney for Respondent

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REPLY BRIEF FOR RUSSELL L. RUNYON, ETC., d/b/a BOBBE'S PRIVATE SCHOOL

INTRODUCTION

This reply brief is intended to be a concise response to the two questions presented by petitioners regarding the award of attorney's fees and the applicability of Virginia's two year statute of limitations, respecting an action brought under 42 U.S.C. § 1981.

ARGUMENT

As a general proposition, the award of attorney's fees has been frowned upon by the courts, and for good reason. A change from this rule would result in flooding the courts with all sorts of spurious litigation.

There was absolutely no finding by the district court that Bobbe's School was acting in bad faith or displaying "obstinate obduracy." Nor was there any finding that any witness for Bobbe's committed prejury, nor is there any basis for it.

It should be pointed out that this suit involves a novel approach to reach a purely private area, and absorb it in the amorphous mass of personal vindication.

Congress did not see fit to provide for the award of attorney's fees in § 1981 actions, thus leading to the obvious conclusion it did not intend that fees be awarded.

The Fourth Circuit Court of Appeals reversed the award of attorney's fees in this case, on sound legal principle. (See *Runyon, et als,* v. *McCrary, et als,* 515 F.(2d) 1083. See also *Bradley* v. *School Board of City of Richmond, Va.,* 345 F.(2d) 321, CCA-4; *Brewer* v. *School Board of City of Norfolk, Va.,* 456 F.(2d) 943, CCA-4.)

APPLICATION OF TWO YEAR STATUTE OF LIMITATIONS WAS PROPER

The Fourth Circuit Court of Appeals has considered the question of the applicable provisions of the Virginia Code § 8-24. And it decided that the claim was certainly not one based on a contract but rather that

a § 1981 damage claim is referable to injured feelings and humiliation. (See p. 41 of Joint Appendix.)

There the court cited *Allen* v. *Gifford,* 462 F.(2d) 615, and *Almond* v. *Kent,* 459 F.(2d) 200, which is sound law. Absent any congressional enactment on this point, then state law is controlling. (*O'Sullivan* v. *Felix,* 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980.)

CONCLUSION

It is submitted that the application of the two year statute of limitations, and the denial of attorneys' fees, was correct.

Respectfully submitted,

LOUIS KOUTOULAKOS
Attorney for Respondents

RUSSELL L. RUNYON, KATHERYNE E. RUNYON, D/B/A BOBBE'S PRIVATE SCHOOL

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